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THE GENERAL STATUTES OF NORTH CAROLINA

1979 CUMULATIVE SUPPLEMENT

JAN 28 1980

Annotated, under the Supervision of the Department of
Justice, by the Editorial Staff of the Publishers

Under the Direction of
D. P. HARRIMAN, S. C. WILLARD AND SYLVIA FAULKNER

Volume 4A

1970 Replacement

Annotated through 297 N.C. 304 and 41 N.C. App. 192. For
complete scope of annotations, see scope of volume page.

**Place with Corresponding Volume of Main Set. This
Supersedes Previous Supplement, Which May
Be Retained for Reference Purposes.**

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BY

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Preface

Scope of Volume

This Cumulative Supplement to Replacement Volume 4A contains amendments and supplementary annotations to the Constitutions of North Carolina and the United States, to the rules of practice in the General Court of Justice of the State and in the United States District Courts for the Middle District, the Eastern District and the Western District of North Carolina and to other matters within the scope of the volume, the Extradition Manual and the Code of Judicial Conduct and rules governing the practical training of law students. It also contains a table of the Session Laws of 1971, the First and Second Sessions of 1973, the First and Second Session Laws of 1975 and 1977 and the First Session Laws of 1979. At the First 1973 Session, the General Assembly enacted Session Laws 1973, Chapters 1 to 826. At the Second 1973 Session, which was held in 1974, the General Assembly enacted Session Laws 1973, Chapters 827 to 1482.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

United States Reports, 1973, p. 185.
Supreme Court Reporter through volume 99.
North Carolina Law Review.
Wake Forest Intramural Law Review.
Duke Law Journal.
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Amendment to the Constitution of the United States ratified in 1971.

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Annotations:

Sources of the annotations to the North Carolina Constitution and to the rules of practice in the State courts:

North Carolina Reports through volume 297, p. 304.
North Carolina Court of Appeals Reports through volume 41, p. 192.
Federal Reporter 2nd Series through volume 597, p. 283.
Federal Supplement through volume 469, p. 738.
Federal Rules Decisions through volume 81, p. 262.
United States Reports through volume 438, p. 783.
Supreme Court Reporter through volume 99.
North Carolina Law Review.
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DECLARATION OF RIGHTS

Section 1. The equality and rights of persons.

Editor's Note. —

For a note on the use of basic constitutional law to void unconstitutional laws and statutes which unconstitutionally restrict freedom of occupational choice, see: 13 Waks Forum 1, Nov. 1977 (127).

This section guarantees the right to pursue business and artistic occupations free from

governmental regulation. North Carolina Decl. Const. 1, amended Bd. of Admin. 21 N.C. App. 8, 222 S.E.2d 805 (1976).

Section 1A-1, Rule 26(a) is not subject to challenge on the grounds that it deprives property without due process of law, and violates the unreasonable search and seizure, double

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ARTICLE I

DECLARATION OF RIGHTS

Section 1. *The equality and rights of persons.*

Editor's Note. —

For a note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

This section guarantees the right to pursue ordinary and simple occupations free from

governmental regulation. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Section 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies

equal protection of the laws, or that it impairs the right to contract. *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972).

The amendment to § 93A-2(a) enacted by Session Laws 1975, c. 108, is unconstitutional as repugnant to Art. I, §§ 1 and 19, of the Constitution of North Carolina. *North Carolina Real Estate Licensing Bd. v. Aikens*, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Applied in *Heritage Village Church &*

Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

Quoted in *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

Cited in *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972); *North Carolina State Bd. of Registration v. IBM Corp.*, 31 N.C. App. 599, 230 S.E.2d 552 (1976); *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 249 S.E.2d 698 (1978).

Sec. 2. *Sovereignty of the people.*

All power which is not limited by the Constitution inheres in the people. *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 217 S.E.2d 650 (1975).

Acts Legal Unless Prohibited. — An act of the General Assembly is legal when the Constitution contains no prohibition against it. *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 217 S.E.2d 650 (1975).

Sec. 6. *Separation of powers.*

Editor's Note. — For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 *Wake Forest L. Rev.* 1082 (1976).

Generally. —

The legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any other coordinate branch or to any agency which it may create. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Effect of Section. — The effect of this section and N. C. Const., Art. II, § 1 is to elucidate the circumstances in which delegation of legislative powers is permissible. *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

Classification of Departments Is Not Exact. — Although this State is firmly committed to the doctrine of separation of powers, the classification cannot be very exact, and there are many officers whose duties cannot be exclusively arranged under the duties of either of the judicial, legislative or executive heads. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Power May Be Delegated to Municipalities. — Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

Exchange of Land by Board of Education.

— There is nothing in the Constitution which prohibits the board of education from exchanging land which it owns for other land for school purposes. *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 217 S.E.2d 650 (1975).

Legislature May Delegate Limited Legislative Power to Administrative Bodies. —

A modern legislature must be able to delegate — in proper instances — a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the legislature cannot deal directly. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

When Legislature May Delegate Legislative Power to Administrative Agency. — As to some specific subject matter, the legislature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Necessity for Adequate Standards when Delegating Power. — The constitutional

inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Purpose of Adequate Guiding Standards Test. — The purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Application of Test. — The key to an intelligent application of the adequate guiding standards test is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Sources for Standards. — In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. Such declarations need be only as specific as the circumstances permit. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to insure that the decision-making by the agency is not arbitrary and unreasoned. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. The presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

The Coastal Area Management Act of 1974 properly delegates authority to the Coastal Resources Commission to develop, adopt and

amend State guidelines for the coastal area. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

The authority delegated to the Coastal Resources Commission is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies, and procedural safeguards. The General Assembly properly delegated to the Commission the authority to prepare and adopt State guidelines for the coastal area. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Legislative Change of Court Jurisdiction. — The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Judicial Functions in Criminal Cases. — The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Manner and Mitigation of Punishment Are Legislative Functions. — The manner of executing a sentence and the mitigation of punishment are determined by the legislative department, and what the legislature has determined in that regard must be put in force and effect by administrative officers. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Legislature May Establish Parole System. — In the division of governmental authority the legislature has exclusive power to determine the penalogical system of the State. It alone can prescribe the punishment for crime. It may therefore establish a parole system. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

The granting, withholding or frustration of the parole power is not and has never been a responsibility of the judicial branch of government. *State v. Snowden*, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

And Administration of Parole System May Be Delegated. — The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Petitioner's contention, that the legislature had provided no standards to guide the Board of Paroles in determining whether a parole violator should serve his original sentence concurrently with his new sentence or at the completion of it and that this failure nullified the purported grant of authority under former § 148-62, could not be sustained. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Assignment of Discretionary Power to Parole Commission. — Former § 148-62, insofar as it grants discretionary power to the Board of Paroles, (now the Parole Commission), is not an assignment of judicial power to the Board of Paroles in contravention of N.C. Const., Art. IV, § 1 and this section. *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

The sentencing process may not be expressly employed to thwart the parole process, the

responsibility for which is vested in another branch of government. *State v. Snowden*, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

Release of a prisoner before completion of his sentence cannot and should not be anticipated with exactness by the trial judge as the basis for the imposition of sentences in cases. *State v. Snowden*, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

Discretionary Right to Enlarge Corporate Limits. — In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in a special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. II, § 1, or this section. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

Quoted in *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974).

Cited in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971); *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 30 N.C. App. 427, 227 S.E.2d 603 (1976), modified, 292 N.C. 1, 231 S.E.2d 867 (1977); *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 249 S.E.2d 698 (1978).

Sec. 8. *Representation and taxation.*

Editor's Note. —

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

Sec. 11. *Property qualifications.*

Cited in *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

Sec. 12. *Right of assembly and petition.*

City Parade Ordinance Constitutional. — Where a city's parade ordinance was codified under the general heading of traffic, its language was directed to the time, place and

manner of parades, and it neither imposed restraint upon speech concerning political matters or matters of public concern nor contained any inkling of discrimination against

defendant, who was arrested for participating in a parade without a permit, the ordinance was

constitutionally valid. *State v. Frinks*, 284 N.C. 472, 201 S.E.2d 858 (1974).

Sec. 13. *Religious liberty.*

The legal tribunals of the State, etc. —

In accord with original. See *Atkins v. Walker*, 19 N.C. App. 119, 198 S.E.2d 101, aff'd, 284 N.C. 306, 200 S.E.2d 641 (1973).

How Civil Courts Must Decide Church Property Disputes. — Civil courts must decide church property disputes without inquiring into underlying controversies over religious doctrines and without in any way basing decision upon any determination made upon such an inquiry. *Atkins v. Walker*, 19 N.C. App. 119, 198 S.E.2d 101, aff'd, 284 N.C. 306, 200 S.E.2d 641 (1973).

Separation of Church and State; Health; Mental Health; Community Pastoral Counseling Program. — See opinion of Attorney General to Mr. Patrick Guyton,

Community Development Specialist, Department of Human Resources, 43 N.C.A.G. 189 (1973).

In a child custody proceeding, the trial court cannot base its findings on the preferability of any particular faith or religious instruction. *Dean v. Dean*, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

The spiritual welfare of a child is a factor that may be considered by the trial court in making a custody determination. *Dean v. Dean*, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

Applied in Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

Cited in *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 14. *Freedom of speech and press.*

Right to Comment on Matters of Public Interest. — Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Such Comments Not Libelous Unless Written Maliciously. — Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

This section is viewed in the light of the doctrine of "qualified privilege." *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

The basis of privilege is the public interest in the free expression and communication of ideas. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Recovery for Defamation Not Allowed Where Public Interest Outweighs State's Interest. — Where this public interest is sufficient to outweigh the interest of the State in protecting the individual or corporate plaintiff from damage to his or its reputation, social or business relationships, the law does not allow recovery of damages, actual or punitive, occasioned by the defamatory speech or publication. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

When Qualified Privilege Is Applicable. — Qualified privilege will apply to a statement made or article written in good faith, without actual malice, (as defined by the law of North Carolina), touching upon a topic in which the speaker or publisher has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Is Question of Law. — Whether a publication is privileged is a question of law to be determined by the court. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Qualified Privilege Not Extended to Sports Reporting. — The North Carolina courts have not, as of yet, extended the doctrine of qualified privilege to the field of sports reporting, nor is there any indication that they will do so in the future. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Malice Necessary to Overcome Qualified Privilege Distinguished from "Actual Malice". — The malice necessary under North Carolina law to overcome the shield of qualified privilege should not be confused with the "actual malice" standard which has been developed from the First Amendment, freedom of the press, decisions under the United States Constitution. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

North Carolina equates actual malice with reckless or careless publication. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), *aff'd* in part and *rev'd* in part, 448 F.2d 378 (4th Cir. 1971).

Falsehood of Statement Not Sufficient to Establish Malice. — In cases of qualified privilege, the falsehood of the statement will not of itself be sufficient to establish malice, for there is a presumption that the publication was made bona fide. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), *aff'd* in part and *rev'd* in part, 448 F.2d 378 (4th Cir. 1971).

City Parade Ordinance Constitutional. — Where a city's parade ordinance was codified

under the general heading of traffic, its language was directed to the time, place and manner of parades, and it neither imposed restraint upon speech concerning political matters or matters of public concern nor contained any inkling of discrimination against defendant, who was arrested for participating in a parade without a permit, the ordinance was constitutionally valid. *State v. Frinks*, 284 N.C. 472, 201 S.E.2d 858 (1974).

Applied in *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

Cited in *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D.N.C. 1974).

Sec. 15. *Education.*

Mandate of Section. — The provisions of this section and N.C. Const., Art. IX, § 2(1), with the activating statutes, including § 115-1, embody mandates for the establishment of free public schools in North Carolina, the untrammelled privilege of education for all students, and "the

duty of the State to maintain and guard that right," while guaranteeing equal opportunities to all students. *Webster v. Perry*, 512 F.2d 612 (4th Cir. 1975).

Quoted in *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972).

Sec. 16. *Ex post facto laws.*

An upward change of criminal penalty by legislative action cannot constitutionally be applied retroactively. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973).

Where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, a change by the legislature to death alone would be *ex post facto* as to such offenses committed prior to the change. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973).

Neither Can Increase by Judicial Action. — While the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973).

Cited in *State v. Kirkman*, 293 N.C. 447, 238 S.E.2d 456 (1977).

Sec. 17. *Slavery and involuntary servitude.*

Cited in *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972); *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972); *State v. Underwood*, 283

N.C. 154, 195 S.E.2d 489 (1973); *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E.2d 288 (1973).

Sec. 18. *Courts shall be open.*

Editor's Note. —

For note on criminal defendants' rights during sentencing, see 50 N.C.L. Rev. 925 (1977).

Right to Speedy Trial. — Every person formally accused of crime is guaranteed a speedy and impartial trial by this section and the Sixth and Fourteenth Amendments of the federal Constitution. *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978).

Prisoners confined for unrelated crimes are entitled to the benefits of the constitutional

guaranty of a speedy and impartial trial. *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978).

Unless some fixed time limit is prescribed by statute, speedy trial questions must be resolved on a case-by-case basis. While all relevant circumstances must be considered, four interrelated factors are of primary significance: (1) the length of delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right and (4) the extent to which defendant has been prejudiced. *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978).

Defendant Causing Delay Not Denied Speedy Trial. — A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice. *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978).

But the constitutional guarantee of a speedy trial does not outlaw good faith delays which are reasonably necessary for the State to prepare and present its case. *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978).

Right Must Be Asserted. — Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978).

The defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in

determining whether the defendant is being deprived of the right. *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978).

The public, and especially the parties, are entitled to see and hear what goes on in the court. That courts are open is one of the sources of their greatest strength. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

Applied in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976).

Quoted in *McLean v. Sale*, 38 N.C. App. 520, 248 S.E.2d 372 (1978).

Sec. 19. *Law of the land; equal protection of the laws.*

I. GENERAL CONSIDERATION.

Editor's Note. —

For note on statutory requirement of safety helmets for motorcyclists, see 6 *Wake Forest Intra. L. Rev.* 349 (1970). For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 *N.C.L. Rev.* 262 (1971).

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 *Wake Forest L. Rev.* 1082 (1976).

For a note on physical restraints on defendant during trial, see 13 *Wake Forest L. Rev.* 231 (1977).

For a note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 *Wake Forest L. Rev.* 507 (1977).

"Liberty". — The term "liberty" is as extensive as is the same term used in the Fourteenth Amendment to the Constitution of the United States. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Under this section no person can be deprived, etc. —

This section provides that no person may be deprived of his property except by the law of the land, or expressed another way, except by due process of law. *Parker v. Stewart*, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

What Constitutes "Law of the Land". —

In accord with 3rd paragraph of original. See *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

The "law of the land" requires that the administration of justice be consistent with the fundamental principles of liberty and justice. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Among other things "the law of the land" or "due process of law" imports both notice and the opportunity to be heard before a competent tribunal. *Parker v. Stewart*, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

"Law of the Land" Has Same Meaning as "Due Process of Law". — The expression "the law of the land," has the same meaning as the expression "due process of law." *Horton v. Gulleddge*, 277 N.C. 353, 177 S.E.2d 885 (1970); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

The law of the land and due process of law are interchangeable terms. *Smith v. Keator*, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

The term "law of the land" as used in this section is synonymous with "due process of law" as used in the Fourteenth Amendment to the federal Constitution. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

"Due process" has a dual significance, etc. —

In accord with original. See *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

In substantive law, due process, etc. —

In accord with original. See *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

A decision of the Supreme Court of the United States construing the due process clause of the Fourteenth Amendment to the federal Constitution, though persuasive, does not control an interpretation by the Supreme Court of North Carolina of the law of the land clause in the Constitution of North Carolina. *Horton v. Gulleddge*, 277 N.C. 353, 177 S.E.2d 885 (1970); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Principle of Equal Protection Expressly Incorporated. — The principle of the equal

protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States has now been expressly incorporated in this section of the Constitution of North Carolina. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

Scope of Police Power of State and Liberty of Individual. — The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the law of the land clause of the State Constitution extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

The State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety and general welfare of society. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

Any exercise by the State of its police power is a deprivation of liberty. *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

The limit of the police power is the reasonable necessity for the action in order to protect the public. *Horton v. Gullede*, 277 N.C. 353, 177 S.E.2d 885 (1970).

Whether a statute is a violation of the law of the land clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm. *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973); *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

The police power does not include power arbitrarily to invade property rights. *Horton v. Gullede*, 277 N.C. 353, 177 S.E.2d 885 (1970).

The legislature may make classifications, etc. —

Neither the equal protection clause of the Fourteenth Amendment to the United States Constitution nor the similar language in this section takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law. *Guthrie v. Taylor*, 279 N.C. 703, 185

S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

To withstand an equal protection claim a statute's classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

Social Welfare Classifications Need Not Be Exact. — In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

Validity Depends upon Reasonable Relation, etc. —

The test required by this section is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972); *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973); *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

The validity of a Sunday closing statute or ordinance depends upon its reasonable relation to the accomplishment of the State's legitimate objective, which, in this instance, is the promotion of the public health, safety, morals and welfare by the establishment of a day of rest and relaxation. Legislation for this purpose, like other legislation, may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted. State

v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

When a special class of persons, such as indigents, is singled out by the legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

The equal protection clause of both the United States and the North Carolina Constitutions imposes upon law-making bodies the requirement that legislative classifications be based on differences that are reasonably related to the purposes of the act in which such are found and are not purely arbitrary. *Brown v. Brannon*, 399 F. Supp. 133 (M.D.N.C. 1975), *aff'd* 535 F. 2d 1249 (4th Cir. 1976).

Legislative classifications will be upheld provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination and has some reasonable relation to the public peace, welfare and safety. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

When a special class of persons is singled out by the legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

The traditional substantive due process test has been that a statute must have a rational relation to a valid State objective. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real or substantial relation to the public health, morals, order or safety or the general welfare. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

Protection against Unreasonable Discrimination Extends to Administration and Execution of Laws. — The constitutional protection in this section against unreasonable discrimination under color of law is not limited to the enactment of legislation. It extends also to the administration and the execution of laws valid on their face. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

If a statute is so loosely and obscurely drawn as to be incapable of enforcement, it must be held void. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

Application and Administration of Law with Unjust and Illegal Discrimination Is within Prohibitions of Constitution. — Though a law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the

prohibition of the Constitution. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

Discriminatory administration of an ordinance is a denial of the equal protection of the law. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

But Mere Laxity in Enforcement Does Not Render Law Invalid. — Mere laxity, delay or inefficiency of the police department, or of the prosecutor, in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

Even selective enforcement does not have that effect if it has a reasonable relation to the purpose of the legislation, such as making efficient use of police manpower by concentrating upon the major sources of the criminal activity. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

Unless There Is Intentional or Purposeful Discrimination. — The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. Such discriminatory purpose is not presumed. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

The good faith of the enforcing officers is presumed. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

And Burden Is on Complainant to Show Intentional Discrimination. — The burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

The equal protection clauses of the United States Constitution and the Constitution of North Carolina require that in making classifications there be no discrimination, that is, there must be some reasonable relation between the class created and the legislative end to be obtained. *Ledwell v. Berry*, 39 N.C. App. 224, 249 S.E.2d 862 (1978).

State economic regulatory classifications need bear only a rational relationship to a legitimate governmental objective in order to withstand an equal protection challenge. *State ex rel. Utilities Comm'n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978).

And It Is Not Sufficient to Show That Numerous Other Violators Have Not Been Prosecuted. — One who violates a law, valid upon its face, does not bring himself within the protection of the discriminatory administration rule merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefor. *S.S.*

Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

A license to engage in an occupation is a property right. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

This section guarantees the right to pursue ordinary and simple occupations free from governmental regulation. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Right to Engage in Lawful Business. — When the State's exercise of its police power works to deny a person, association or corporation the right to engage in a business, otherwise lawful, such deprivation of liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive an attack based upon this section. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon this section. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Rights to Contract and Engage in Business Are Not Absolute. — Freedom to contract and engage in a lawful business activity are rights guaranteed by the State and federal constitutions. However, these rights are not absolute, and limitations thereon imposed by the legislature are not violative of the constitutional provisions so long as they are reasonable in light of the purposes to be accomplished. Louchheim, Eng & People, Inc. v. Carson, 35 N.C. App. 299, 241 S.E.2d 401 (1978).

The government may not revoke an occupational license except by due process of law. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

A city ordinance which bestowed unbridled discretionary power upon the city council to grant or to refuse to grant a license to an individual, persons, associations or corporation to engage in the business of operating a restaurant, lunch counter, pressing club, moving picture show or market in the city violated the provisions of this section and the Fourteenth Amendment to the Constitution of the United

States. Carolina Restaurants, Inc. v. City of Kinston, 32 N.C. App. 588, 233 S.E.2d 74 (1977).

Freedom to contract, etc. —

In accord with 2nd paragraph in original. See Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

Sovereign immunity is not a defense to action against the State for breach of contract entered into by the State's authorized officers and agencies, since to deny the party who has performed his obligation under a contract the right to sue the State when it defaults is to take his property without compensation and thus to deny him due process. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment, but it can be restricted with due process of law. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Quarantine of Disaster Areas. — The constitutional protection of the freedom of travel does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Due Process in Juvenile Proceedings. — In order to comply with due process in a juvenile delinquency proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

Where the district court held a preliminary hearing, determined whether there was probable cause to believe the juveniles guilty, and transferred the case to the superior court, in substance, though not in form, the court complied with the requirements of this section. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974).

Notice and Opportunity to Be Heard, etc. —

In accord with 4th paragraph in original. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Notice and hearing are essential to due process of law. In re Wilson, 13 N.C. App. 151, 185 S.E.2d 323 (1971).

In order that there be a valid adjudication of a party's rights, he must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding. In re Wilson, 13 N.C. App. 151, 185 S.E.2d 323 (1971).

Both the law of the land and due process of law import notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L.Ed.2d 636 (1974).

Notice is not a prerequisite to the determination of questions of a political nature, such as the necessity and expediency of a taking, but is only necessary prior to the determination of the issue of just compensation. *City of Durham v. Manson*, 21 N.C. App. 161, 204 S.E.2d 41, modified on other grounds, 285 N.C. 741, 208 S.E.2d 662 (1974).

Eligibility for In-State Tuition is Not Basic Constitutional Right. — A person's right to eligibility for in-state tuition is quite different from his basic constitutional right to travel freely from one state to another or his basic constitutional right to vote. The regulations of the Board of Trustees of the University of North Carolina do not impede interstate travel. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L.Ed.2d 999 (1973).

And Less Stringent Equal Protection Standard Applies. — The regulations of the Board of Trustees of the University of North Carolina concerning eligibility for in-state tuition do not impede interstate travel. Since they do not relate to basic constitutional rights, the regulations are to be tested by the less stringent traditional equal-protection standards. The constitutional test is whether the regulations have tended in general to assure that only North Carolina citizens get the benefit of in-state tuition, which the regulations have done. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L.Ed.2d 999 (1973).

Prohibiting Certain Activities on Sunday. —

The general rule is that the enactment of Sunday regulations is a legitimate exercise of the police power, and that the classification on which a Sunday law is based is within the discretion of the legislative branch of the government or within the discretion of the governing body of a municipality clothed with power to enact and enforce ordinances for the observance of Sunday, and will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972).

In determining whether a Sunday ban on the operation of billiard halls, but on no other businesses which provide facilities and opportunities for recreation, amusements and sports, denies equal protection to the operators of billiard halls, consideration must be given to the purpose of the ordinance and to the classification involved. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972).

Utilities Commission Intended to Set Rates as Low as Constitutionally Possible. — The origin of § 62-133 supports the inference that the legislature intended for the Utilities Commission to fix rates as low as may be reasonably consistent with the requirements of the due process clause of the Fourteenth Amendment to the Constitution of the United States, those of this section being the same in this respect. *State ex rel. Utilities Comm'n v. Duke Power Co.*, 285 N.C. 377, 206 S.E.2d 269 (1974).

An order entered ex parte allowing a utility to effectuate a fuel adjustment clause did not, in view of the procedures available to contest such action, violate Art. I, § 19 of the State Constitution. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 230 S.E.2d 651 (1976).

Applied in *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971); *In re Hawkins*, 17 N.C. App. 378, 194 S.E.2d 540 (1973); *State v. Alderman*, 25 N.C. App. 14, 212 S.E.2d 205 (1975); *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975); *State v. Putman*, 28 N.C. App. 70, 220 S.E.2d 176 (1975); *State v. Robinson*, 290 N.C. 56, 224 S.E.2d 174 (1976); *Nantz v. Employment Security Comm'n*, 290 N.C. 473, 226 S.E.2d 340 (1976); *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976); *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 239 S.E.2d 479 (1977); *Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs.*, 294 N.C. 120, 240 S.E.2d 406 (1978); *State v. Gunther*, 38 N.C. App. 279, 248 S.E.2d 97 (1978); *State v. Williams*, 295 N.C. 655, 249 S.E.2d 709 (1978); *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

Quoted in *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

Cited in *McKinney v. Board of Comm'rs*, 278 N.C. 295, 179 S.E.2d 313 (1971); *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972); *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972); *Taylor v. Tri-County Elec. Membership Corp.*, 17 N.C. App. 143, 193 S.E.2d 402 (1972); *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973); *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973); *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D.N.C. 1974); *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975); *State v. Woodson*, 287 N.C. 578, 215 S.E.2d 607 (1975); *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975); *Britt v. Britt*, 26 N.C. App. 132, 215 S.E.2d 172 (1975); *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 217 S.E.2d 650 (1975); *State Farm Mut. Auto. Ins. Co. v. Ingram*, 288 N.C. 381, 218 S.E.2d 364 (1975); *Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 221 S.E.2d 297 (1976); *In re Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976); *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 30 N.C. App. 427, 227 S.E.2d 603

(1976), modified, 292 N.C. 1, 231 S.E.2d 867 (1977); *State v. Terry*, 30 N.C. App. 372, 226 S.E.2d 846 (1976); *North Carolina State Bd. of Registration v. IBM Corp.*, 31 N.C. App. 599, 230 S.E.2d 552 (1976); *Loughlin v. North Carolina State Bd. of Registration*, 32 N.C. App. 351, 232 S.E.2d 219 (1977); *Biltmore Co. v. Hawthorne*, 32 N.C. App. 733, 233 S.E.2d 606 (1977); *State v. Giles*, 34 N.C. App. 112, 237 S.E.2d 305 (1977); *North Carolina Auto. Rate Administrative Office v. Ingram*, 35 N.C. App. 578, 242 S.E.2d 205 (1978); *Spencer v. Spencer*, 37 N.C. App. 481, 246 S.E.2d 805 (1978); *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 249 S.E.2d 698 (1978); *Annas v. Davis*, 40 N.C. App. 51, 252 S.E.2d 28 (1979); *Garrison v. Miller*, 40 N.C. App. 393, 252 S.E.2d 851 (1979).

II. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

Criminal Statute Must Be Definite. — A criminal statute or ordinance must be sufficiently definite to inform citizens of common intelligence of the particular acts which are forbidden. *State v. Sanders*, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

Exclusion of Negroes from Grand Jury. —

Where the defendant's evidence related to the racial composition of only one grand jury and one list of petit jurors, it did not show a course of conduct over a period of time resulting in an apparent systematic exclusion of the members of the Negro race from the grand juries or list of petit jurors and thus failed to establish a *prima facie* case of systematic exclusion of the members of the Negro race from either the grand jury which indicted the defendant or the petit jury which convicted him. *State v. Newkirk*, 14 N.C. App. 53, 187 S.E.2d 394, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972).

Burden upon Defendant to Establish Exclusion. — If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it, but once he establishes a *prima facie* case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The burden is upon the defendant to establish racial discrimination in the composition of the jury. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L.Ed.2d 1205 (1976).

Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded people of defendant's race from jury which is not supported by the record fails to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. *State v. Waddell*, 289 N.C. 19, 220

S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L.Ed.2d 1210 (1976).

Representation on juries in proportion to racial population, etc. —

A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

A defendant has no right to be tried by a jury containing members of his own race or even to have representative of his own race to serve on the jury. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L.Ed.2d 1205 (1976); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); *State v. Foddrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

But Indictment and Trial, etc. —

In accord with 1st paragraph in original. See *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race, the conviction cannot stand. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Defendant does have the right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); *State v. Pearson*, 32 N.C. App. 213, 231 S.E.2d 279 (1977); *State v. Foddrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

To establish a *prima facie* case of systematic racial exclusion, defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, or both. *State v. Foddrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

Must Allege Systematic and Arbitrary Exclusion. — In the absence of a contention that blacks were systematically and arbitrarily excluded from the jury pool, unless there is systematic and arbitrary exclusion, then a defendant has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. *State v. Pearson*, 32 N.C. App. 213, 231 S.E.2d 279 (1977).

Denial Does Not Overcome Prima Facie Discrimination. — The mere denial by officials charged with the duty of listing and summoning

jurors that there was no intentional, arbitrary or systematic discrimination on the ground of race is not sufficient to overcome a prima facie case of racial discrimination. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Evidence Insufficient to Establish Prima Facie Discrimination. — Evidence that the black adult population of a county amounted to 20% of the total county population and that during the biennium beginning January 1970 approximately 10% of the petit jurors appearing for service in the court room were Negro, was held insufficient to make out a prima facie case of racial discrimination. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that the person named lived in a predominantly black or predominantly white neighborhood did not show an opportunity for discrimination sufficient to make out a prima facie case of racial discrimination. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Where defendant has failed to make out a prima facie case of arbitrary or systematic exclusion of Negroes from the jury, he has failed to show any violation of his constitutional rights as guaranteed by this section. *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973).

Defendant's mere showing that all Negroes were challenged by the solicitor is not sufficient to establish a prima facie case of an arbitrary and systematic exclusion of Negroes. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

A jury list is not discriminatory, etc. —

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. Nor is a jury commission limited to the sources specifically designated by § 9-2. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Exclusion of Age Group from Jury List. — The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Section Prohibits Double Jeopardy. —

In accord with 2nd paragraph in original. See *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972); *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973); *State v. Cannon*, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

It is a fundamental principle of the common law, now guaranteed by the federal and state constitutions, that no person can be twice put in

jeopardy of life or limb for the same offense. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971); *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

The sacred principle of the common law that no person can twice be put in jeopardy of life or limb for the same offense has always been an integral part of the law of North Carolina, therefore, the decision in *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), which made the double jeopardy provision of the Fifth Amendment applicable to the several states through the Fourteenth Amendment, added nothing to the law of this State. *State v. Battle*, 279 N.C. 484, 183 S.E.2d 641 (1971).

The common-law principle that no person can be twice put in jeopardy of life or limb for the same offense is now guaranteed by both the federal and the State Constitutions. *State v. Allen*, 16 N.C. App. 159, 191 S.E.2d 403, appeal dismissed, 282 N.C. 305, 192 S.E.2d 193 (1972).

Prohibition against double jeopardy has long been regarded as a part of the "law of the land" in North Carolina. *State v. Urban*, 31 N.C. App. 531, 230 S.E.2d 210 (1976).

The constitutional prohibition against double jeopardy applies only to criminal cases. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

The constitutional principle of double jeopardy is designed to protect an accused from double punishment as well as double trials for the same offense. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

When Defendant Is Placed in Double Jeopardy. — A defendant is placed in double jeopardy when he is tried twice or punished twice for the same crime. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

The general rule is that the defense of double jeopardy is not jurisdictional. *State v. McKenzie*, 292 N.C. 170, 232 S.E.2d 424 (1977).

Double jeopardy is a personal defense. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

The defense of double jeopardy is personal to the defendant. *State v. McKenzie*, 292 N.C. 170, 232 S.E.2d 424 (1977).

The burden is upon defendant to sustain his plea of double jeopardy. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

Generally the defense of double jeopardy is raised by a special plea upon which the defendant carries the burden. *State v. McKenzie*, 292 N.C. 170, 232 S.E.2d 424 (1977).

Abandonment of Plea of Double Jeopardy. — Where the defendant fails to plead double jeopardy and to offer supporting evidence thereon, he is therefore deemed to have abandoned the plea of double jeopardy. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

Test of Double Jeopardy. — The double jeopardy tests are whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment, or whether the same evidence would support a conviction in each case. *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972).

The applicable double jeopardy test in an assault case is the "same evidence test" which asks two questions. First, whether the facts alleged in the second indictment if given in evidence would have sustained a conviction under the first indictment. (The answer to this question is determined by an examination of the two indictments.) The second question posed by the "same evidence test" asks "whether the same evidence would support a conviction in each case" and looks at facts dehors the indictments. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

It is obvious that both petitions for adjudication of delinquency arose from the same incident. This does not, however, automatically require a finding that jeopardy has twice attached. The test of former jeopardy is not whether respondent has been tried for the same act, but whether he has been put in jeopardy for the same offense. The offenses must be the same both in fact and in law. In *re Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

"Additional Facts" Test Explained. — The additional facts test of double jeopardy is as follows: a single act may be an offense against two statutes, and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *State v. Cannon*, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

Application of Additional Facts Test. — The additional facts test is bilateral in its application. The two offenses may have one or more circumstances in common, but in order to constitute sufficiently for prosecution either of the offenses, some additional circumstance must be added. It is the added circumstance to each which makes each a separate and distinct offense. *State v. Cannon*, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

"Lesser Degree" Rule. — In determining whether jeopardy had attached, it is necessary to apply tests firmly established by the courts. First the "lesser degree" rule. Where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act, an acquittal or conviction for the first is a bar to a prosecution for the second. *State v. Cannon*, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

By the term, "same offense," is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject

an offender to indictment and punishment. When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater. *State v. Cannon*, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

A plea of former jeopardy, etc. —

To support the plea of double jeopardy, it is of no consequence that the earlier prosecution grew out of the same transaction. It must have been the same offense both in fact and in law. *State v. Wiggins*, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

When Jeopardy Attaches. — Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971); *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972); *State v. Allen*, 16 N.C. App. 159, 191 S.E.2d 403, appeal dismissed, 282 N.C. 305, 192 S.E.2d 193 (1972); *State v. Chavis*, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

It is clearly established in this State that jeopardy cannot attach until a jury has been sworn and empaneled. *State v. Chavis*, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Double Jeopardy Provision Not Violated by Mistrial Order and Another Trial. — Both federal decisions, applying the Fifth Amendment, and State decisions, applying common law and State constitutional principles, have recognized that, in certain situations arising in criminal prosecutions, the court may order a mistrial before verdict and again place defendant on trial without violating the double jeopardy prohibition. *State v. Preston*, 9 N.C. App. 71, 175 S.E.2d 705 (1971).

An order of mistrial in a criminal case when the jurors declare their inability to agree must be left to the trial judge, in the exercise of his judicial discretion, and will not support a plea of former jeopardy. *State v. Battle*, 279 N.C. 484, 183 S.E.2d 641 (1971).

Where it was unchallenged that an expression of opinion by a law-enforcement officer as to the weakness of the State's case had reached the

jury box, the juror's statement that he would not be prejudiced by this remark would not, standing alone, prevent the trial judge from exercising his discretion and declaring a mistrial and the defendant's subsequent plea of former jeopardy was properly denied. *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

Where Mistrial Was Ordered for Physical Necessity or Necessity of Doing Justice. — Even where all the elements of jeopardy appear, a plea of former jeopardy will not prevail where the order of mistrial was properly entered for "physical necessity or for necessity of doing justice." *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

A subsequent trial of a defendant, following the termination of earlier proceedings upon an order of mistrial, is not precluded by a plea of former jeopardy where the mistrial was granted, over defendant's objections, due to "a physical necessity or the necessity of doing justice." *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

"Physical necessity" is illustrated where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial, or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Necessity of doing justice" is not an expression connoting a vague generality but one that relates to a limited subject, namely, the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Necessity of doing justice" arises from the duty of the court to guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

The test of "necessity of doing justice" does not exist solely for the benefit of a defendant. It is fundamental in our system of jurisprudence that each party to an action is entitled to a fair and impartial trial. *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

Duty of Judge Ordering Mistrial in Capital Cases. — In all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge, but in capital cases he is required to find the facts fully and place them upon record so that upon a plea of former jeopardy, the action of the court may be reviewed. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

In capital cases the trial court must make findings of fact upon granting a mistrial and place them in the record so that the court's

action may be reviewed on appeal. *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

The decision to grant a mistrial is a decision well within the trial judge's discretion when faced with the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. *State v. Shuler*, 293 N.C. 34, 235 S.E.2d 226 (1977).

Temporary Interruption of Trial. — Defendant was not subjected to double jeopardy and he was subjected to only one trial where there was a temporary interruption of the trial based upon the unexpected inability of a scheduled witness to be present due to his physical condition. *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Applicability in Juvenile Proceedings. — Juvenile proceedings in North Carolina do more than merely determine the delinquency of the minor; they may result in severe curtailment of his freedom and, in some cases, in institutional commitment. Although distinctions between juvenile proceedings and criminal prosecutions do still exist, they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attaches to the initial petition once an adjudicatory hearing on the merits is held. *In re Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Plea of Double Jeopardy May Be Waived. — The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by a defendant. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

And Waiver May Be Implied. — A waiver of the constitutional right not to be placed in jeopardy twice for the same offense is usually implied from the action or inaction of a defendant when brought to trial in the subsequent proceeding. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

A plea of guilty constitutes a waiver of the plea of former jeopardy. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

If double jeopardy is raised as a defense it is abandoned by a subsequent plea of guilty. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

When defendant entered a plea of guilty to a charge after his previously entered plea of former jeopardy was overruled he thereby waived his right, if any, to dismissal of the charge on the ground of former jeopardy. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

As Does Appeal. — When a defendant seeks a new trial by appealing his conviction he waives his protection against re prosecution. *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977).

Two Offenses Arising Out of Same Transaction. — Since possession and sale of heroin are separate offenses, defendant was not subjected to double jeopardy where he was tried for both offenses arising out of the same transaction, found guilty of such and given consecutive sentences. *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973).

Possession and distribution of heroin are separate and distinct offenses, and a defendant may be prosecuted for both without violating the constitutional prohibition against double jeopardy. *State v. Patterson*, 21 N.C. App. 443, 204 S.E.2d 709 (1974).

The crimes of possession and sale are separate and distinct offenses and a conviction on both such offenses does not constitute double jeopardy. *State v. Gleason*, 24 N.C. App. 732, 212 S.E.2d 213 (1975).

Since illegal possession of a controlled substance is not a lesser included offense of illegal sale, there is no violation of the constitutional proscription against double jeopardy in the punishment of defendant for both crimes growing out of a single transaction. *State v. Aikens*, 22 N.C. App. 310, 206 S.E.2d 348, aff'd, 286 N.C. 202, 209 S.E.2d 763 (1974).

Defendant may be convicted for both conspiracy to commit robbery and the commission of the same robbery without being subject to double jeopardy. *State v. Wiggins*, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

Plea of Former Jeopardy Upheld. — Where judgment of nonsuit on the ground of variance was entered in a defendant's trial upon an indictment charging armed robbery of a store in which the life of a named employee was endangered and in which money belonging to the store was taken from the named employee and where defendant was subsequently prosecuted upon another armed robbery indictment for the same occurrence which alleged that the lives of two other employees were endangered and that the money was taken from the two other employees, and where the evidence in both trials showed that the robbery was perpetrated by endangering and threatening all employees then present in the store, including those named in both indictments, but that the money was removed from the immediate presence of the two employees named in the second indictment, the Supreme Court held that the same evidence would support a conviction in both trials, and therefore defendant's plea of former jeopardy prior to his second trial should have been allowed. *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972).

The affray charge upon which respondent juvenile was convicted had as an essential element the assault charge which had been dismissed for lack of evidence. Consequently, respondent's acquittal on the assault charge

barred further petitions based on that charge. Therefore, respondent was twice put in jeopardy for the same offense under § 14-33 and the trial judge erred in failing to dismiss the petition. In re *Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Revocation of Driver's License Cannot Constitute Double Jeopardy. — Since the revocation of a driver's license is not a form of criminal punishment, it cannot constitute double jeopardy. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

A defendant has no vested right to a particular juror. *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

Right to Reject Prejudicial Juror. — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in his favor. *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

Sustaining State's Challenges of Jurors. — Where it was perfectly clear from their answers that each of the prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be, the State's challenges for cause were properly sustained. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L.Ed.2d 761 (1972).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

Section Preserves Right of Confrontation and Cross-Examination. — "The law of the land" guaranteed by this section of the Constitution, synonymous with "due process," preserves the right of confrontation and cross-examination to an accused in a criminal action. By cross-examination a witness may be questioned as to prior inconsistent statements or as to any act inconsistent with his testimony in order to impeach him or cast doubt upon his credibility. *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970).

The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by this section and N.C. Const., Art. I, § 23. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

The right to face one's accusers and witnesses with other testimony is guaranteed by the Sixth

Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, this section, and by Art. I, § 23, of the Constitution of North Carolina. *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976).

The rights to assistance of counsel and of confrontation of one's accusers and witnesses are guaranteed by the Sixth Amendment to the federal Constitution and by Art. I, §§ 19 and 23 of the North Carolina Constitution. *State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976).

The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals that the pretrial procedures were so unnecessarily suggestive and conducive to an irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *State v. Artis*, 31 N.C. App. 193, 228 S.E.2d 768, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976).

Showups. — Although the practice of showing suspects singly for identification purposes has been recognized as suggestive and widely condemned, whether such a confrontation violates due process depends upon the totality of the circumstances. *State v. Shore*, 285 N.C. 328, 204 S.E.2d 682 (1974).

In-Court Identification Held Competent. — When the trial court found and concluded that the in-court identification of defendant by the witnesses was not tainted by any outside confrontation but was based upon the identification during the course of the alleged robbery, and this finding is supported by competent evidence, it alone renders the in-court identification competent even if it be conceded arguendo that the showup procedure was improper. *State v. Shore*, 285 N.C. 328, 204 S.E.2d 682 (1974).

Where nothing in the record indicates that the out-of-court photographic identification, which identified the defendant as the perpetrator of the crime, was unlawful and impermissibly suggestive, the in-court identification was not tainted by the out-of-court identification. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

There was no violation of this provision in requiring the defendant to stand before the jury and place the orange stocking mask over his head and face in the way the victim had testified it was worn by the man who robbed and shot her. *State v. Perry*, 291 N.C. 284, 230 S.E.2d 141 (1976).

Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State*

v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977).

Finding of Competency Conclusive When Supported by Competent Evidence. — A finding that an in-court identification of defendant was not tainted or rendered incompetent as evidence by the subsequent unconstitutional showup, when supported by competent evidence, is conclusive on appellate courts, both State and federal. *State v. Odom*, 18 N.C. App. 478, 197 S.E.2d 35 (1973).

The fact that under § 15A-941 the solicitor reads the charges or fairly summarizes them to the defendant before the jury is not a violation of defendant's right to due process and equal protection as required by the Constitutions of the State of North Carolina and the United States. *State v. Carter*, 30 N.C. App. 59, 226 S.E.2d 179, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

In the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence that it interferes with a fair and just decision of the question of guilt or innocence. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Burden of Showing Necessity on State. — Because of the inherent prejudice engendered by the use of shackles, the rule since the earliest cases has been that the burden of showing necessity for such measures rests upon the State. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

The rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Judicial Discretion. — The power to order a defendant to stand trial while handcuffed or shackled calls for a meaningful exercise of judicial discretion. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Reasons on Record. — When the trial judge, in jury cases, contemplates the necessity of employing unusual visible security measures such as shackles, he should state for the record, out of the presence of the jury, the particular reasons therefor and give counsel an opportunity to voice objections and persuade the court that such measures are unnecessary. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Jury Instruction. — In any case where the trial judge, in the exercise of sound discretion, determines that the defendant must be

handcuffed or shackled, it is of the essence that he instruct the jury in the clearest and most emphatic terms that it gives such restraint no consideration whatever in assessing the proofs and determining guilt. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

The trial court should take all reasonable precautions to insure that the jury's deliberations and verdict remain untainted by their observations of defendant while he is so restrained. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Objection Required for Appeal. — Defendant, while ordinarily constitutionally entitled to appear at his own trial free of shackles, must, when shackling is suggested, object to the proposed restraint and, absent reasonable excuse therefor, failure to do so will ordinarily preclude the shackling as an issue on appeal. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Test on Appeal. — The propriety of physical restraints on an accused depends upon the particular facts of each case, and the test on appeal is whether, under all the circumstances, the trial court abused its discretion. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

A defendant in a criminal proceeding whether at trial or in pretrial proceedings may waive his right to counsel if he does so freely and understandingly and with full knowledge of his right to be represented by counsel. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

Indigent Defendant Can Waive Counsel. — The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

Indigency is obviously a sufficient basis for classification with reference to the right to court-appointed, publicly paid counsel, but it is not a reasonable basis for classification as to the right to represent one's self. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

The guarantee of counsel only applies to "critical stages" of the prosecution, and what constitutes a critical stage is determined both from the nature of the proceedings and from the facts in each case. *State v. Hall*, 39 N.C. App. 728, 252 S.E.2d 100 (1979).

A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires

assistance of counsel. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

Right to Counsel Includes Reasonable Time for Preparation. — The constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable time to prepare for trial. However, no set length of time for investigation, preparation and presentation is required and whether defendant is denied due process must be determined upon the basis of the circumstances in each case. *State v. Moore*, 39 N.C. App. 643, 251 S.E.2d 647 (1979).

But Where Defendant's Actions Prevented Adequate Preparation, He Is Solely Responsible. — The conduct of a defendant in failing either to retain counsel or to avail himself of his right to court appointed counsel, if he were indigent, may make him solely responsible for any lack of trial preparation on the part of his counsel. *State v. McDiarmid*, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

Free Transcript for Indigents. — There are no constitutional infirmities in the denial of a free transcript of the district court proceedings to an indigent defendant. *State v. Brooks*, 287 N.C. 392, 215 S.E.2d 111 (1975).

State's de novo procedure has no requirement that a defendant purchase and provide the superior court with a transcript of the district court proceedings in order to secure full appellate review. *State v. Brooks*, 287 N.C. 392, 215 S.E.2d 111 (1975).

The purpose of State's de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a "speedy trial" in the district court and to offer them an opportunity to learn about the State's case without revealing their own. *State v. Brooks*, 287 N.C. 392, 215 S.E.2d 111 (1975).

Discretion to Prosecute for Capital Offense or Not. — Defendant's argument that he was denied due process because the district attorney had the absolute discretion to charge and prosecute for a capital offense or to bring an accused to trial upon a lesser included offense has been considered and rejected in a number of cases. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Where a motion for continuance is based on a right guaranteed by the Constitution, the

decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325 (1976); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

If a defendant's motion for a continuance in a criminal prosecution is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion and the ruling of the trial court is reviewable on appeal. *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976).

In a prosecution for kidnapping and assaulting a policeman with a firearm, the trial court erred in denying the defendant's motion for a continuance under circumstances in which the 17 days the defendant's counsel had to prepare for trial was not a reasonable time to comply with the defendant's constitutional right to assistance of counsel in his defense. *State v. Moore*, 39 N.C. App. 643, 251 S.E.2d 647 (1979).

Statements that Defense Counsel Was from Another Part of State. — Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

The privilege against disclosure of an informant's identity, etc. —

In accord with 1st paragraph in original. See *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973).

Inculpatory Statements. — Cases dealing with a defendant's inculpatory statements project two predominant concerns: (1) that the circumstances surrounding defendant's interrogation do not render his statement inherently unreliable because involuntary; and (2) that overzealous officers be deterred from the use of unconstitutional and illegal practices in obtaining a statement from the accused. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Admissibility of Death Certificate. — Defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Right of Cross-Examination. —

Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325 (1976); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325 (1976); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Scope of Cross-Examination. — In cross-examination the witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been arrested for, indicted for or accused of an unrelated criminal offense. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Acquittal on Basis of Insanity. — A verdict of not guilty due to insanity constitutes a full acquittal, and one thus acquitted is entitled to all the protection and constitutional rights as if acquitted upon any other ground. *In re Tew*, 280 N.C. 612, 187 S.E.2d 13 (1972).

Restoration to Sanity Procedure Is Unconstitutional. — Since the absolute certification requirement of former § 122-86 would not permit a petitioner to establish his restoration to sanity by the testimony of qualified psychiatrists, and provided no remedy or procedure whatever to determine a charge that a superintendent arbitrarily withheld a certificate, acted in bad faith, or was honestly mistaken in judgment, but rather merely decreed that no judge should discharge a person acquitted of crime because of insanity until the superintendents of the several State hospitals had certified to his sanity and safety, it did not meet the requirements of due process and was therefore unconstitutional. *In re Tew*, 280 N.C. 612, 187 S.E.2d 13 (1972).

When the punishment does not exceed the limits fixed by statute, it cannot be considered cruel and unusual punishment in a constitutional sense. *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977).

Punishment When Person Is Without Knowledge of Facts Making Act Criminal. — It is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal, and this is particularly so when the controlling statute does not require the act to have been done knowingly or willfully. *Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 220 S.E.2d 536 (1975).

Imposition of Punishment, etc. —

Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Harrell*, 281 N.C. 111, 187 S.E.2d 789 (1972).

Reasonable Time for Defense. — It is implicit in these constitutional guarantees that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense of the accused. *State v. Vick*, 287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

No set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. *State v. Vick*, 287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution and N.C. Const., Art. I, §§ 19 and 23, is denied unless counsel has adequate time to investigate, prepare and present his client's defense. Even so, no set time is guaranteed and whether a defendant is denied effective assistance of counsel must be determined upon the circumstances of each case. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

Assistance of Counsel Means Effective Assistance. — The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978); *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

And May Be Considered on Direct Appeal. — The question of alleged failure of counsel to render effective representation can be considered on direct appeal. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

There are no set rules to determine whether a defendant has been deprived effective assistance of counsel; rather each case must be

approached upon an ad hoc basis, viewing circumstances as a whole in order to determine this question. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

The question of effective assistance of counsel involving the physical incapacity of counsel does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions ad hoc and in each case view the circumstances as a whole. *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

Trial Judge Better Able to Evaluate Effectiveness. — The trial judge, who actually sees the lawyer's behavior, is better able than an appellate court to evaluate the overall effectiveness of representation. *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

Assistance Effective. — Notwithstanding the defense attorney's hearing disability, his efforts and the assistance of co-counsel provided defendant with effective legal representation throughout the criminal proceedings. *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

Right to Effective Assistance of Counsel Not Denied. — In the absence of any showing that the withdrawal of a motion to consolidate for trial charges against two defendants in any way prejudices defendant's case and denies him his right to effective counsel, there is no error in the denial of the motion to continue. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Mere Failure to Grant Continuance Not Denial of Effective Assistance. — Unless counsel suggests the existence of material witnesses or information that would possibly lead to material evidence or material witnesses, the mere failure to grant a continuance in order to make investigation would not, in and of itself constitute a denial of effective assistance of counsel. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

Enjoining Enforcement of Ordinance by Criminal Prosecution. — Nothing else appearing, the enforcement of an ordinance, by the criminal prosecution of those who violate it, will not be enjoined in a suit brought by an acknowledged violator, whose contention is that the ordinance is invalid or that it is administered or enforced in a discriminatory manner in violation of the equal protection of the laws. His right to present this defense at his trial on the criminal charge, or to maintain a civil action for damages, is deemed to constitute an adequate remedy at law. Where, however, a plaintiff's legitimate business is threatened with destruction, through an announced purpose of

making repeated arrests of his employees or customers and charging them with the violation of an allegedly invalid law, a suit for injunctive relief is an appropriate procedure for testing the equal protection constitutionality of the law, or of the contemplated enforcement program. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

III. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

Property May Be Taken Only for Public Use. —

Private property can be taken by the exercise of the power of eminent domain only where the taking is for a public use. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Due process of law requires that private property be taken under the power of eminent domain only for a public use. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Prohibition of Use of Property. — It is quite true that the police power of the State, which it may delegate to its municipal corporation, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety, or morals or the general welfare and that, when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970); *Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 206 S.E.2d 802, cert. denied, 285 N.C. 757, 209 S.E.2d 281 (1974).

Police Regulation Can Only Be Justified by Presence of Public Interest. — Police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

The lawmaking authorities may not, under the guise of police power, impose restrictions which are unnecessary and unreasonable upon the use of private property. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

The only warrant for public interference with a person's building is to secure public safety and protect health of those occupying the building. Desirable as it might be from an aesthetic point of view to have public control of private building, the law does not permit an

invasion of private rights on such grounds. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

State May Not Regulate Use of Property for Aesthetic Reasons. — The State, itself, may not, under the guise of the police power, regulate the use of property for aesthetic reasons which have no real or substantial relation to the public health, safety or morals, or to the general welfare. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

Public necessity is the limit of the right to destroy property which is a menace to public safety or health and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

Land to Increase Highway Visibility May Not Be Taken under Guise of Police Power. — If, in the interest of public safety at an intersection of highways, greater visibility is required than is afforded by removing obstructions from existing rights-of-way, land necessary to afford such increased view of approaches to the intersection may be taken by the appropriate public authorities under the power of eminent domain, with just compensation for the land so taken paid to the property owner; but the property may not be taken for such purpose, without compensation, under the guise of a regulation of the owner's business pursuant to the police power. *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972).

Restriction on Location of Fence Is a Taking. — An ordinance that a fence must be built substantially within the boundaries of a lot in which an automobile wrecking business is located is a taking of the lot owner's property for a public use without compensation. *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972).

Retrospective statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States or this section or violate any other constitutional limitation upon legislative power. *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973).

Statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law or violate any other constitutional limitation upon legislative power. *Crumpton v. Crumpton*, 290 N.C. 651, 227 S.E.2d 587 (1976).

Substitute condemnation is a transaction in which the State or an agency with the power of eminent domain, A, takes land under an agreement to compensate its owner, B, with land to be taken in condemnation proceedings from a third person, C, instead of with money. *North*

Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

There is no denial of due process or other constitutional infirmity in substitute condemnations where the owner of the land first taken with whom the ultimate condemnee's land is to be exchanged, also has the power of condemnation and could itself have condemned the land. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Public Use and Necessity in Substitute Condemnation. — In controversies concerning substitute condemnation the questions of public use and necessity are inseparable. Whether land has been taken for a public use in a substitute condemnation will depend on whether fairness requires that B whose land has been taken for an undisputed public purpose, be compensated in land and whether there is a close factual connection between the taking of B's and C's land, taken to compensate B. Whether it is necessary to exercise the power of eminent domain will turn on whether B can be fairly compensated only in land. Whether it is necessary to take C's property depends on whether there is a close factual connection between the two takings. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation of land for exchange can only be justified when the property for which it is substituted accomplishes the public purpose for which it was taken, and the cost is not disproportionate to the benefit derived. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation is a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Ordering Demolition of House for Nonconformity with City Housing Code. — An action by a municipality, pursuant to an ordinance adopted under the authority of former § 160-182, in ordering the demolition of a dwelling house without compensation to the owner thereof, and in charging the expense of demolition to the owner upon his failure to demolish the house himself, such action being based upon findings by the city building inspector that the house was unfit for human habitation and that the repairs necessary to bring the house into conformity with the housing code would cost 60% or more of the present value of the house, is violative of the law of the land clause of the State Constitution, where (1) the house could be repaired so as to comply with the

housing code and (2) the owner was not afforded a reasonable opportunity to repair the house. *Horton v. Gulleddge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

Where it appears from the findings of a city housing commission that a house can be repaired so as to comply with the city's housing code, be suitable for human habitation and be no longer a threat to public health, safety, morals or general welfare, to require its destruction without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare is arbitrary and unreasonable. Such power may not be delegated to or exercised by a municipal corporation of this State by reason of this section. *Horton v. Gulleddge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

A homeowner who is faced with a municipal housing inspector's order giving him no alternative but to demolish his home that was declared uninhabitable by the municipality, or to pay the expense of a demolition by the municipality, is not required to propose an alternative remedy for the condition of the house before asserting his constitutional right in the courts. *Horton v. Gulleddge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

City May Compensate for Easements by Agreement to Furnish Fire Protection Outside City Limits. — A municipality has the authority to compensate landowners for a water and sewer line easement across a tract of land located outside the municipal limits by an agreement to furnish fire protection for any buildings located on such tract. *Valevias v. City of New Bern*, 10 N.C. App. 215, 178 S.E.2d 109 (1970).

Zoning ordinance which required that owner of building material salvage yard remove his property within three years did not amount to a taking of his property for a public purpose without just compensation where he was notified on several occasions after the expiration of three-year period that he was in violation of the law, but he made no effort to comply with the ordinance because he "did not think it was fair." *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2618, 45 L. Ed. 2d 666 (1975).

IV. MATTERS RELATING TO TAXATION.

Classification for Tax Purposes. —

In accord with 2nd paragraph in original. See *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

In accord with 3rd paragraph in original. See *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

When Courts Will Interfere with Tax Assessments. — It is only when the actions of the State Board of Assessment are found to be

arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause. *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972).

A sales tax on retailers who sell merchandise through vending machines (including items sold for less than ten cents where it is impossible to recoup the tax from the purchaser) does not violate constitutional provisions relating to due process and equal protection. *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

V. ILLUSTRATIVE CASES.

The right to travel upon the public streets of a city is a part of every individual's liberty, protected by the law of the land clause of the Constitution of North Carolina. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

But Curfew May Be Imposed Where Danger Is Clear and Present. — Where the danger is clear and present, the Constitution of the United States and Constitution of North Carolina do not forbid city authorities to declare a state of emergency and to proclaim and enforce a temporary, night-to-night, city-wide curfew, with specified exceptions for emergency and necessary travel. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

Violations of Motor Vehicle Laws as Crimes. — The bases for the inclusion of violations of motor vehicle and traffic laws within the scope of the due process rule permitting punishment of persons for certain crimes related to public welfare or safety, even when such persons are without knowledge of the facts making an act criminal, are that (1) the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon the roads and (2) the punishments for such violations are usually a small fine. *Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 220 S.E.2d 536 (1975).

The due process rule permitting punishment for certain crimes related to public welfare or safety, even when persons convicted of these crimes are without knowledge of the facts making the act criminal, is not to be extended beyond petty offenses involving light punishment nor to any crime involving moral delinquency. *Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 220 S.E.2d 536 (1975).

The sterilization of mentally ill or retarded persons under §§ 35-36 through 35-50, inclusive, is a valid and reasonable exercise of the police power. In re *Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sections 35-36 through 35-50, inclusive, provide a sufficient judicial standard and are not

unconstitutionally vague or arbitrary. In re *Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

Since the North Carolina law applies equally to all those named, §§ 35-36 through 35-50, inclusive, do not violate the equal protection clauses of the United States or North Carolina Constitutions. In re *Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sections 35-36 and 35-37 do not violate the equal protection clauses of the United States or North Carolina Constitutions since they provide for the sterilization of all mentally ill or retarded persons inside or outside an institution who meet the requirements of these statutes. In re *Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

The contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization under § 35-36 is not a criminal proceeding. In re *Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

State interests in the sterilization of mentally ill or retarded persons rise to the level of a compelling State interest. In re *Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

The statutory scheme of Chapter 14, Article 36A is not unconstitutional in contravention of this section. *State v. Dobbins*, 9 N.C. App. 452, 176 S.E.2d 353 (1970), *aff'd*, 277 N.C. 484, 178 S.E.2d 449 (1971).

The notice of foreclosure by sale as provided for in a deed of trust and as required under § 45-21.17 was held sufficient to meet the minimum due process requirements. *Huggins v. Dement*, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972).

Special Use Permit. — Where a municipal ordinance required the board of adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

Pretrial Discovery. — Section 1A-1, Rule 26(b), authorizing the pretrial discovery of the existence and contents of insurance, does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. *Marks v. Thompson*, 14 N.C. App. 272, 188 S.E.2d 22, *aff'd*, 282 N.C. 174, 192 S.E.2d 311 (1972).

Section 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or that it impairs the right to contract.

Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

The notice requirement of § 105-375 is not compelled by due process. Furthermore, due process having been satisfied by notice to the listing taxpayer as provided by § 105-375, the county is not required to shoulder the intolerable burden of directly notifying the heirs of a listing taxpayer who died prior to issuance of execution. *Henderson County v. Osteen*, 28 N.C. App. 542, 221 S.E.2d 903 (1976), rev'd on other grounds, 292 N.C. 692, 235 S.E.2d 166 (1977).

The notice requirement of § 105-375 is not constitutionally compelled. Due process of law imports notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Due process was satisfied when the listing taxpayer was notified, at least two weeks prior to docketing a tax judgment, "that the judgment will be docketed and that execution will issue thereon in the manner provided by law." *Henderson County v. Osteen*, 28 N.C. App. 542, 221 S.E.2d 903 (1976).

Chapter 143, Article 7 Is Not Unconstitutional in Contravention of This Section. — See *State ex rel. Dorothea Dix Hosp. v. Davis*, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

There is no constitutional impediment to the collection of the sums sought by the State pursuant to § 143-117 for the period of confinement following defendant's acquittal by reason of insanity. *State ex rel. Dorothea Dix Hosp. v. Davis*, 292 N.C. 147, 232 S.E.2d 698 (1977).

The patient who is required to pay the "actual cost" of his treatment pursuant to § 143-117 is, in actuality, paying for services rendered to and received by him. This does not constitute a deprivation of property without just compensation. The patient receives treatment in return for his payments. *State ex rel. Dorothea Dix Hosp. v. Davis*, 292 N.C. 147, 232 S.E.2d 698 (1977).

Section 148-62 (now repealed) did not deprive a defendant of liberty other than by the law of the land in that it failed to provide adequate standards to guide the Board of Paroles in exercise of the discretionary power granted to it, as contended. *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Enjoining Expenditure of Public Funds for Corporation Not Created for Public Purpose. — If an act creating a corporation is unconstitutional as violative of N.C. Const., Art. V, § 2 and Art. I, § 19, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is void because the purpose for which the corporation was created is not a public purpose, then taxpayer may maintain an action to restrain state officials from paying to the corporation and the

corporation from using money appropriated out of the general fund. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Former § 90-291 Unconstitutional. — See *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

Prohibiting Certain Activities on Sunday. — A Sunday closing ordinance which singles out and bans the operation of billiard halls on Sunday but permits other businesses which provide facilities for recreation, sports and amusements, and which potentially are equally disruptive, violates the equal protection clauses of the North Carolina and United States Constitutions. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972).

In order for a Sunday closing ordinance enacted by authority of former § 153-9(55) to withstand an attack upon its constitutionality as arbitrary or discriminatory, it is not necessary that the legislative body, in the same ordinance, prohibit everything which is detrimental to the public morals, health or safety. *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

It is sufficient that there is reasonable basis for belief that the operation on the day of rest of the excepted businesses is necessary or conducive to the enjoyment by the public of the designated day as a day of rest, and that the activities of the defendant are not. *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

Unconstitutional discrimination in a county ordinance requiring businesses generally to be closed on a specified day of the week, designated by the legislative body as a day of rest, and exempting from such requirement certain types of business is not shown by the fact that the ordinance of some other county or municipality does not contain identical exemptions from its general closing requirement. *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

The regulation of persons eligible to become licensed private detectives and commissioned special policemen is an exercise of authority in the interest of the general public, rather than a particular class. *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

Health Insurance Can't Be Required of Insurer. — The State may not, consistent with the law of the land clause of this section, or the due process clause of the Fourteenth Amendment to the Constitution of the United States, require an insurance company to engage in the health care liability insurance business as a condition to its right to continue to carry on an entirely different business for which it is duly licensed by the State and in which it wants to be, and is, engaged. *Hartford Accident & Indem. Co. v. Ingram*, 290 N.C. 457, 226 S.E.2d 498 (1976).

Different Dismissal Procedures Do Not Deny Equal Protection. — It is not a denial of

equal protection for the State to prescribe one procedure for the dismissal of a school teacher during the school year on the ground of immoral or disreputable conduct or failure to perform the teacher's contract, and to prescribe a different procedure for the termination of the employment at the end of the school year under § 115-142. The vast difference in the consequences of these two actions, insofar as the future effect upon the teacher's professional standing and ability to obtain employment is concerned, is ample basis for classification within the limits of the Fourteenth Amendment and of this section. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971).

Requirement of Teaching Certificate Renewal Is Reasonable. — A regulation of the State Board of Education which requires all teachers employed in the public school system of North Carolina to obtain a renewal of their teaching certificates every five years and prescribes for all teachers the same number of credits and the same methods for obtaining such credits does not deny equal protection of the law, notwithstanding that the regulation does not apply to employees of the Board who are not engaged in teaching whose duties are performed in the Board's offices. Since the purpose of requiring a certificate to teach is to assure good quality of performance in the classroom, there is an obvious and reasonable basis for making the rule applicable to those who teach and omitting from its applicability those who do not. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Nonattendance Domicile Requirement to Qualify for In-State Tuition. — The six-month nonattendance requirement to qualify for in-state tuition adds objectivity and certainty to the requirement of domicile. This is not obtained by placing an unreasonable burden on students. Petitioners are not barred by regulations of the Board of Trustees of the University of North Carolina from becoming domiciliaries of North Carolina. Nor are they barred from becoming eligible for in-state tuition. Rather, they are only required, if they want that status, to be domiciled in North Carolina for six months while not in the law school. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972); vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

That the Board of Trustees of the University of North Carolina might have chosen other objective indicators to test the domiciliary intent of applicants for in-state tuition is not to say the one chosen was unreasonable. That there may be hardship cases resulting from the enforcement of these regulations is also not to say they are unreasonable. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972);

vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

Domiciliary Status of Women. — Under the regulations of the Board of Trustees of the University of North Carolina, domiciliary status is not equivalent to in-state tuition status. Although a woman is deemed a domiciliary of North Carolina from the date of her marriage, to become eligible for in-state tuition, a married woman, just as any other student, has to establish actual residence in this State for six continuous months exclusive of the time spent while in attendance at an institution of higher education. The regulations place upon all students domiciled in North Carolina who wish to qualify for in-state tuition, regardless of sex, the burden of showing that they have been domiciled in North Carolina for six months while not in attendance at an institution of higher education, and did not deny to men similarly situated a benefit in violation of the equal protection clauses of the North Carolina and United States Constitutions. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

Subdivisions (a)(4) b and c of former § 28-174 allowing recovery for services rendered to decedent and for loss of society in a wrongful death action, were not unconstitutionally vague and therefore violative of this section. See *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973).

The amendment to § 93A-2(a) enacted by Session Laws 1975, c. 108, is unconstitutional as repugnant to Art. I, §§ 1 and 19, of the Constitution of North Carolina. *North Carolina Real Estate Licensing Bd. v. Aikens*, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Section 14-72.2 violates the provisions of North Carolina Const., Art. I, § 19 and of the Fourteenth Amendment to the Constitution of the United States and accordingly, it is void. *State v. Graham*, 32 N.C. App. 601, 233 S.E.2d 615 (1977).

A statute imposing criminal sanctions for the infliction of physical injury on children by their parents is not repugnant to this section. *State v. Fredell*, 283 N.C. 242, 195 S.E.2d 300 (1973).

The "nonsigner" provision of former § 66-56 was unconstitutional, insofar as it purported to extend to one not a party thereto the effect of a fair trade contract, because it deprived the nonsigner of liberty, contrary to the law of the land, in violation of this section. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Failure to provide a court reporter, where a court reporter was unavailable, is not fatal where there is no showing of prejudice. In *re Custody of Cox*, 24 N.C. App. 99, 210 S.E.2d 223

(1974), cert. denied, 286 N.C. 414, 211 S.E.2d 793 (1975).

Hearing Inadequate. — Where the county commissioners attempted to commission the sheriff as a special tribunal to conduct hearings on alleged violations of the ordinance, the provisions for revocation of licenses of massage parlors after a hearing before the sheriff did not afford the constitutionally required "opportunity to be heard or defend in a regular proceeding before a competent tribunal." *Parker v. Stewart*, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

Exploration Tracking Rate Increases Not Violative of Due Process. — Exploration tracking rate increases were not in violation of equal protection by virtue of having been made without any attempt to determine which customers would benefit, since it was within the authority of the commission to determine that all gas ratepayers would benefit from increased supplies of natural gas, both through assured availability and improvement in the State's economy. *State ex rel. Utilities Comm'n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978).

The severe adverse economic effects sought to be avoided by approval and funding of exploration projects through tracking rate increases provided for by rule present a sufficient public concern to outweigh the infringement of ratepayers' freedom of contract, if any there be, arising from the rate increases ordered by the utilities commission. *State ex rel. Utilities Comm'n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978).

Granting Motion for Speedy Trial When Interests of Justice Require Continuance. — Having determined from evidence of the

defendant's impaired mental capacity that the interests of justice required that the defendant's case be continued in order that the defendant could be granted the opportunity to seek compulsory attendance of witnesses and the effective assistance of counsel, the trial court erred in allowing the case to proceed to trial upon the defendant's motion for a speedy trial and for leave to withdraw his prior motions for a continuance, where no evidence was introduced before the trial court indicating that the defendant's impairments had subsided or no longer existed. Having determined that the interests of justice required a continuance, the action of the trial court in allowing the case to proceed to trial without evidence or findings that the impediments to those rights had subsided constituted a denial of those rights as well as the defendant's rights to due process of law and equal protection of the laws. *State v. Brooks*, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Session Law 1975, c. 269 Is Unconstitutionally Overbroad. — Chapter 269 of the 1975 North Carolina Session Laws, which prohibits the deliberate shining of an artificial light from a motor-driven conveyance beyond the surface of a roadway or in any field, woodland or forest in an area frequented or inhabited by wild game animals during certain evening hours in specified counties violates due process because it is so overbroad as to constitute arbitrary and unreasonable interference with innocent conduct and it lacks any rational, real or substantial relation to the public health, morals, order, safety or general welfare. *State v. Stewart*, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

Sec. 20. *General warrants.*

Cross Reference. —

As to illegal searches in general, see note to §§ 15A-231, 15A-241.

Search Defined. — A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. *State v. Raynor*, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

Fact of Search Must First Be Established. — Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search. *State v. Raynor*, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

It does not prohibit seizure, etc. —

The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

The constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant when no search is required. *State v. Raynor*, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

The constitutional guarantees against unreasonable search and seizure do not prohibit a seizure of evidence without a warrant when no search is required and the seized article is in plain view. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977).

Protection Extends Only to Unreasonable Searches. — Constitutional protection does not extend to all searches and seizures, but only to those which are unreasonable. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

The guarantees of this section protect against unreasonable searches and seizures. They are designed for the protection of the innocent. *State v. Ellington*, 284 N.C. 198, 200 S.E.2d 177 (1973).

Except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. *State v. Frederick*, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

The reasonableness of the search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the criteria laid down by the Fourth Amendment and opinions which apply that amendment. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Unreasonable Search Defined. — North Carolina has defined an unreasonable search to be an examination or inspection without authority of law of one's premises or person with a view to the discovery of some evidence of guilt to be used in the prosecution of a criminal action. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

All searches and seizures are not prohibited. The Constitution proscribes only those which are "unreasonable." *State v. Frederick*, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

Evidence which is obtained as a result of an unreasonable search and seizure may not be admitted in either the State or federal courts. *State v. Frederick*, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

Evidence obtained by an unreasonable search and seizure is inadmissible. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977).

Items in Plain View. — No search warrant is needed to seize items in plain view, and they are properly admitted into evidence. *State v. Thompson*, 15 N.C. App. 416, 190 S.E.2d 355, cert. denied, 282 N.C. 307, 192 S.E.2d 197 (1972).

When police officers discover evidence of a crime in plain view, without the necessity of a search, they may seize the evidence without obtaining a search warrant. *State v. Young*, 21 N.C. App. 369, 204 S.E.2d 556, cert. denied, 285 N.C. 595, 206 S.E.2d 867 (1974).

When police officers lawfully enter a person's premises and observe evidence of a crime in plain view, they may seize it without obtaining a search warrant. *State v. Carr*, 21 N.C. App. 470, 204 S.E.2d 892 (1974).

While conducting a lawful search, where officers found in plain view property identified as that reported missing, these items were lawfully seized. *State v. Travatello*, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

When contraband material is in plain view no search is necessary and the constitutional guarantee against unreasonable search and seizure does not prevent either the seizure of the

contraband without a warrant or its introduction into evidence. *State v. Walker*, 25 N.C. App. 157, 212 S.E.2d 528, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126, modified, 27 N.C. App. 295, 219 S.E.2d 76 (1975).

By being lawfully on the premises officers are entitled to seize such evidentiary objects connected with defendants as are in plain view. *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1975).

When Plain View Rule Applies. — The "plain view" rule does not apply unless the police have a right to be at the place where the evidence is discovered. *State v. Young*, 21 N.C. App. 369, 204 S.E.2d 556, cert. denied, 285 N.C. 595, 206 S.E.2d 867 (1974).

When the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. *State v. Raynor*, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

When evidence is delivered to a police officer upon request and without compulsion or coercion, the constitutional provisions prohibiting unreasonable search and seizure are not violated. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977).

Purpose of Particular Description. — The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

General Warrants Unconstitutional. — The general warrant against which this constitutional provision speaks did not specify items to be searched for or persons to be arrested nor were they supported by showings of probable cause that any particular crime had been committed. *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

Warrants Proscribed. — This section proscribes warrants that empower officials to search for evidence of a particular offense without specifically naming the person against whom the offense is charged, the particular place to be searched or the items to be seized. *Brooks v. Taylor Tobacco Enterprises, Inc.*, 39 N.C. App. 529, 251 S.E.2d 656 (1979).

Description of Books. — The particularity requirement is to be accorded the most scrupulous exactitude when the things are books, and the basis for the seizure is the ideas which they contain. When First Amendment rights are not involved, the specificity requirement is more flexible. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Description of Narcotics Sufficient. — A warrant empowering officers to seize a limited class of things, i.e., unlawfully possessed narcotic drugs, is not prohibited. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and this section where the affidavit upon which it was based referred only to "narcotic drugs, the possession of which is a crime" and did not describe the things to be seized with more particularity. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and this section. *State v. Shirley*, 12 N.C. App. 440, 183 S.E.2d 880, cert. denied, 279 N.C. 729, 184 S.E.2d 885 (1971).

Reference to Affidavit Held Sufficient Description. — Where an affidavit complied with the provisions of the applicable statute and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant, the search warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. *State v. Murphy*, 15 N.C. App. 420, 190 S.E.2d 361 (1972).

Duty of Trial Court. — The trial court has a duty to pass upon the validity of a search and the competency of evidence procured thereunder when properly made the subject of inquiry. *State v. Thompson*, 15 N.C. App. 416, 190 S.E.2d 355,

cert. denied, 282 N.C. 307, 192 S.E.2d 197 (1972).

Search of Automobiles and Other Conveyances. — Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Where the police officers are exercising proper precautionary measures, it is not error to complete the search of defendant's automobile at a scene more tranquil than that at which the arrest was made. *State v. Hardy*, 17 N.C. App. 169, 193 S.E.2d 459 (1972), cert. denied, 283 N.C. 107, 194 S.E.2d 635, 414 U.S. 999, 94 S. Ct. 352, 38 L. Ed. 2d 235 (1973).

Seizure of Non-Taxpaid Liquor Held Justified. — When officers saw the liquid in containers generally used to contain and transport non-taxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained non-taxpaid liquor to justify the seizure of the contraband without a search warrant. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Judge Issuing Search Warrant May Review Its Validity. — There is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge. *State v. Brown*, 20 N.C. App. 413, 201 S.E.2d 527, appeal dismissed, 285 N.C. 87, 204 S.E.2d 21 (1974).

Cited in *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975); *Gooden v. Brooks*, 39 N.C. App. 519, 251 S.E.2d 698 (1979).

Sec. 21. *Inquiry into restraints on liberty.*

Editor's Note. —

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

Restraint on Court's Power to Release Inmate Acquitted on Grounds of Insanity Is Invalid. — The power of the court to discharge a person acquitted of crime because of insanity

upon habeas corpus cannot be made to depend solely upon certification by the superintendents of the several State hospitals that he is now sane and safe. Such a condition deprives the court of any exercise of judicial discretion and nullifies its power to release an inmate being illegally detained in a mental hospital. *In re Tew*, 280 N.C. 612, 187 S.E.2d 13 (1972).

Sec. 22. *Modes of prosecution.*

The purposes of this section and § 23 of this Article are (1) to provide certainty so as to identify the offense, (2) to protect the accused

from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or

plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. *State v. Foster*, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

Valid Indictment Necessary. —

A valid indictment is essential to the jurisdiction of the court in a criminal case. *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975).

An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction. *State v. Lowe*, 295 N.C. 596, 247 S.E.2d 878 (1978).

All of the essential elements of the offense must be alleged in an indictment charging a statutory offense. *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975).

Use of Statutory Language. — An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

If an indictment charges the offense in a plain, intelligible and explicit manner and

contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

A preliminary hearing is not a constitutional requirement nor is it essential to the finding of an indictment. *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Trial in Superior Court upon Original Accusation. —

In accord with 2nd paragraph in original. See *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973); *State v. Caldwell*, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of N.C. Const., Art. I, § 23 and this section for failure to charge additionally that the victim was forcibly carried away against her will. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

Applied in *State v. Brown*, 21 N.C. App. 87, 202 S.E.2d 798 (1974).

Sec. 23. *Rights of accused.*

I. GENERAL CONSIDERATION.

The purposes of this section and § 22 of this Article are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. *State v. Foster*, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

The common law does not recognize a right of discovery in criminal cases. *State v. Chavis*, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

When Motion for Continuance, etc. —

Ordinarily a motion for a continuance is addressed to the trial judge's sound discretion and his ruling is not subject to review on appeal in the absence of gross abuse. However, when the motion is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion, and the order of the court below is reviewable. *State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976).

If a defendant's motion for a continuance in a criminal prosecution is based on a right guaranteed by the federal and State

Constitutions, the question presented is one of law and not of discretion and the ruling of the trial court is reviewable on appeal. *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976).

If a motion for a continuance is based upon a right guaranteed by either the United States or North Carolina Constitution, the issue is one of law and the decision of the lower court is reviewable by this court. *State v. Beeson*, 292 N.C. 602, 234 S.E.2d 595 (1977).

While a motion for continuance is ordinarily addressed to the sound discretion of the trial court, and the trial court's ruling is not subject to review absent abuse of discretion, if the motion is based on the constitutional right of confrontation, in that the refusal of the motion denied defendant a reasonable time within which to prepare and present his defense, the decision of the trial court is reviewable as a question of law. *State v. Abernathy*, 295 N.C. 147, 244 S.E.2d 373 (1978).

Prejudicial Statements to Jurors. — In a capital case, any argument made by the solicitor, or by private prosecution appearing for the State, which suggests to the jury that they can depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant. *State v. White*, 286 N.C. 395, 211 S.E.2d 445 (1975).

Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

To implement the constitutional rights under this section the General Assembly enacted former § 15-47. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Instruction Informing Jury of Death Sentence. — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by N.C. Const., Art. I, §§ 19, 36 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

Jurisdiction of Superior Court as to Specific Misdemeanors. — The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973).

One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23, as any other accused. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Applied in *State v. Williams*, 18 N.C. App. 145, 196 S.E.2d 370 (1973); *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975); *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976); *State v. Legette*, 292 N.C. 44, 231 S.E.2d 896 (1977).

Cited in *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972); *State v. Hardy*, 17 N.C. App. 169, 193 S.E.2d 459 (1972); *State v. Lankford*, 31 N.C. App. 13, 228 S.E.2d 641 (1976); *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977); *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977); *State v. Eatman*, 34 N.C. App. 665, 239 S.E.2d 633 (1977); *State v. Creech*, 37 N.C. App. 261, 245 S.E.2d 817 (1978); *State v. Evans*, 40 N.C. App.

390, 253 S.E.2d 35 (1979); *State v. Hunt*, 297 N.C. 131, 254 S.E.2d 19 (1979).

II. RIGHT TO BE INFORMED OF ACCUSATION.

Purpose. —

In accord with original. See *State v. Sutton*, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

The purpose of the provision guaranteeing the right to be informed of the accusation is to enable the defendant to have a fair and reasonable opportunity to prepare his defense, to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense and to enable the court, on conviction, to pronounce sentence according to law. *State v. Hartley*, 39 N.C. App. 70, 249 S.E.2d 453 (1978).

A valid indictment is essential to the jurisdiction of the court in a criminal case. *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975).

Indictment Must Allege All Essential Elements, etc. —

To implement the basic constitutional right that every person charged with crime has the right to be informed of the accusation, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. *State v. Sutton*, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

An indictment charging a statutory offense must allege all of the essential elements of the offense. *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975).

The time fixed in a bill of indictment usually is not an essential fact, and the State may prove the crime was committed on another date. Time is not ordinarily of the essence of an offense, but when the State fixes the date in the indictment and the defendant presents evidence of an alibi relating to that date, time becomes of the essence. The State may not, after the defendant has presented his alibi evidence and rested his case, introduce evidence tending to show the defendant's commission of the crime charged on another date. To permit a conviction on such evidence would violate rights guaranteed by this section. *State v. Vincent*, 35 N.C. App. 369, 241 S.E.2d 390 (1978).

Sufficiency of Charging Offense, etc. —

An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

In a prosecution for larceny, the property alleged to have been taken should be described by the name usually applied to it in its condition at that time, and, if possible, the number, kind, quality, and other distinguishing features. *State v. Hartley*, 39 N.C. App. 70, 249 S.E.2d 453 (1978).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the

court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

Indictment for Larceny, etc. —

In an indictment for larceny the description "automobile parts . . . of one Furches Motor Company" sufficiently identifies the property alleged to have been stolen and this section and § 22 of this Article and their purposes. The description identifies the type of parts and the owner from whom they were taken. *State v. Foster*, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

Where warrant which charged defendant with breaking and entering for the purpose of threatening to kill charged only a misdemeanor, and where he received his first notice that he was charged with breaking and entering with intent to commit larceny when the indictment was returned on the day of the trial, he was forced into a trial for which he was not allowed sufficient time to prepare his defense. *State v. Smathers*, 287 N.C. 226, 214 S.E.2d 112 (1975).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of N.C. Const., Art. I, § 22 and this section for failure to charge additionally that the victim was forcibly carried away against her will. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

III. RIGHT OF CONFRONTATION.

Federal Rights Applicable to States. — The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by this section and N.C. Const., Art. I, § 19. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

The right to face one's accusers and witnesses with other testimony is guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by Art. I, §§ 19 and 23, of the Constitution of North Carolina. *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976).

The right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Right of Cross-Examination Jealously Guarded. — One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); *State v. Harrill*,

289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Right Includes Opportunity, etc. —

A defendant has the constitutional right, in a criminal prosecution, to confront his accusers with other testimony. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

But the right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests. *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978).

Right to Compel Attendance of Witnesses Denied. — Having determined from evidence of the defendant's impaired mental capacity that the interests of justice required that the defendant's case be continued in order that the defendant could be granted the opportunity to seek compulsory attendance of witnesses and the effective assistance of counsel, the trial court erred in allowing the case to proceed to trial upon the defendant's motion for a speedy trial and for leave to withdraw his prior motions for a continuance, where no evidence was introduced before the trial court indicating that the defendant's impairments had subsided or no longer existed. Having determined that the interests of justice required a continuance, the action of the trial court in allowing the case to proceed to trial without evidence or findings that the impediments to those rights had subsided constituted a denial of those rights as well as the defendant's rights to due process of law and equal protection of the laws. *State v. Brooks*, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

And to Prepare and Present Defense. —

Every defendant is entitled under the Constitution to have a reasonable opportunity to prepare his defense. This includes the right to consult with his counsel and to have a fair and reasonable opportunity, in the light of all attendant circumstances, to investigate, to prepare, as well as to present his defense. This right must be accorded every person charged with a crime. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

It is implicit in these constitutional guarantees that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense of the accused. *State v. Vick*, 287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

No set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. *State v. Vick*,

287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

It is implicit in the guarantees of assistance of counsel and of confrontation of one's accusers and witnesses that an accused have a reasonable time to investigate, prepare and present his defense. However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. *State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976).

Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978).

A criminal defendant is entitled to offer evidence in defense at trial, either through her own testimony or through the testimony of other witnesses. *State v. Hunt*, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The right of a defendant to confront, etc. —

A party to either a civil or criminal proceeding may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him, hostile to his cause, or that the witness is interested adversely to him in the outcome of the litigation. *State v. White*, 286 N.C. 395, 211 S.E.2d 445 (1975).

Witnesses Must Be Present. — The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

A sufficient good faith effort to obtain the witness's presence at the trial must be shown to justify use of his prior testimony. *State v. Biggerstaff*, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

Disclosure of Informant Not Relevant Where Ample Independent Evidence of Guilt Exists. — Disclosure of the informant whose information led the police to the defendant would not be relevant or helpful to defendant where there is ample independent evidence of his guilt. *State v. McDougald*, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Prosecution's privilege to withhold the identity of an informer is founded upon public interest in effective law enforcement and its application turns on the facts of each particular case. *State v. Ketchie*, 286 N.C. 387, 211 S.E.2d 207 (1975).

Where defendant does not contend that the informant participated in or witnessed the alleged crime, he has no constitutional right to discover the name of the informant. *State v. Ketchie*, 286 N.C. 387, 211 S.E.2d 207 (1975).

The improper admission of evidence which violates the right to confrontation does not constitute prejudicial error unless there is a reasonable possibility that such evidence contributed to defendant's conviction. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

When an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Introduction of Transcribed Testimony Given at Former Trial of Same Offense. —

In accord with 1st paragraph in original. See *State v. Biggerstaff*, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

Admission of Search Warrant and Affidavit.

— It is error to allow a search warrant together with the affidavit to obtain search warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. *State v. Jackson*, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

In-Court Identification. — Where the evidence shows that the witness had a good and sufficient opportunity to observe a defendant at the time the offense was being committed, and testifies that his in-court identification is based on his observation made at that time, the test of "clear and convincing evidence" is met. *State v. Jackson*, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

If there is objection to an in-court identification by a witness who participated in an illegal lineup procedure, such evidence must be excluded unless it be determined on voir dire that the in-court identification is of independent origin and therefore not tainted by the illegal lineup. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Where nothing in the record indicates that the out-of-court photographic identification, which identified the defendant as the perpetrator of the crime, was unlawful and impermissibly suggestive, the in-court identification was not tainted by the out-of-court identification. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Admission of Death Certificate Violated Due Process. — Defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Out-of-Court Declarations. — Even when the right of confrontation is afforded to a defendant implicated in the out-of-court declarations of a codefendant, the prejudicial impact of testimony of the codefendant's declarations must be evaluated in the light of the competent evidence admitted against the nondeclarant defendant. The gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858 (1972).

Extrajudicial statements made by defendants which implicated a codefendant were not inadmissible where each declarant took the stand and testified that the substance of the statements attributed to him was false. *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858 (1972).

Defendants' constitutionally protected rights of confrontation, due process, and equal protection were violated by the denial of their request to inspect what they contended was a written pretrial out-of-court statement by the State's witness. *State v. Chavis*, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Admission of Codefendant's Confession Inculcating Accused. — An accused's constitutional right of cross-examination is violated at his joint trial with a codefendant who does not testify, when the court admits the codefendant's confession inculcating the accused, notwithstanding jury instructions that the confession must be disregarded in determining the accused's guilt or innocence. *State v. Heard*, 285 N.C. 167, 203 S.E.2d 826 (1974).

In joint trials of defendants it is necessary to exclude extrajudicial confessions unless all

portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or declarant; and if such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately, assuming (1) that the confession is inadmissible as to the codefendant, and (2) that the declarant will not take the stand. *State v. Heard*, 285 N.C. 167, 203 S.E.2d 826 (1974).

Subsequent Conviction Lacks Due Process of Law. — Where the effect of a failure of the arresting officer and of the custodian of the arrested person to perform their respective duties is such as to deprive a person of the constitutional right to call for evidence in his favor, his subsequent conviction lacks the required due process of law and cannot stand. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Rights of Person Accused of Offense Involving Intoxication. — When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. The statute says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325 (1976), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Court May Not Forbid Defendant Appearing in Propria Persona to Offer Detrimental Evidence. — The trial court is not authorized to forbid a defendant appearing in propria persona to offer evidence, otherwise competent, for the reason that, in the judgment of the court, however sound, such evidence would be detrimental to the defendant. The defendant, whether represented by counsel or appearing in propria persona, is entitled to use his own judgment as to the wisdom of introducing otherwise competent evidence. To deny him this right is to deny him his constitutional rights afforded both by the Sixth Amendment to the Constitution of the United States and N.C. Const., Art. I, § 23. *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978).

IV. RIGHT TO COUNSEL.

A defendant has a constitutional right, etc. —

Both the State and federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

Best Available Counsel, etc., Not Guaranteed. — The right to counsel does not guarantee the best available counsel, errorless counsel, or satisfactory results for the accused. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974); *State v. Fuller*, 27 N.C. App. 249, 218 S.E.2d 515 (1975); *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

Right Applies to Juvenile Proceedings. — In order to comply with due process in a juvenile delinquency proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

Failure to Appoint Counsel in Trial for Misdemeanors. — Defendant was not denied his constitutional right to counsel by failure of the trial court to appoint counsel to represent him in the consolidated trial of two misdemeanors where neither offense was a serious offense, notwithstanding that the maximum punishment for the two offenses could have been seven months. *State v. Speights*, 12 N.C. App. 32, 182 S.E.2d 204, aff'd, 280 N.C. 137, 185 S.E.2d 152 (1971).

This right is not intended to be an empty formality. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977); *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978); *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

Counsel Must Have Opportunity to Investigate, Prepare and Present Defense. — Since the law regards substance rather than form, the constitutional guaranty of the right of counsel contemplates not only that a person charged with crime shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare and present his defense. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971); *State v. Alderman*, 25 N.C. App. 14, 212 S.E.2d 205 (1972), appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d

296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326 (1975).

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution and N.C. Const., Art. I, §§ 19 and 23, is denied unless counsel has adequate time to investigate, prepare and present his client's defense. Even so, no set time is guaranteed and whether a defendant is denied effective assistance of counsel must be determined upon the circumstances of each case. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

Unless counsel suggests the existence of material witnesses or information that would possibly lead to material evidence or material witnesses, the mere failure to grant a continuance in order to make investigation would not, in and of itself, constitute a denial of effective assistance of counsel. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

The constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable time to prepare for trial. However, no set length of time for investigation, preparation and presentation is required and whether defendant is denied due process must be determined upon the basis of the circumstances in each case. *State v. Moore*, 39 N.C. App. 643, 251 S.E.2d 647 (1979).

In a prosecution for kidnapping and assaulting a policeman with a firearm, the trial court erred in denying the defendant's motion for a continuance under circumstances in which the 17 days the defendant's counsel had to prepare for trial was not a reasonable time to comply with the defendant's constitutional right to assistance of counsel in his defense. *State v. Moore*, 39 N.C. App. 643, 251 S.E.2d 647 (1979).

Determining Inadequacy of Representation. — The question of constitutional inadequacy of representation cannot be determined solely upon the amount of time counsel spends with the accused or upon the intensiveness of his investigation. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

Each case must be approached upon an ad hoc basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

It is not ipso facto a denial of effective assistance because counsel were notified of their appointment and on the same day learned that the cases would be called for trial the following day. *State v. Alderman*, 25 N.C. App. 14, 212 S.E.2d 205 (1972), appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

The mere fact that the defendant was convicted does not show that his counsel was either incompetent, neglectful or ineffective. *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

Even the most skilled counsel for the defense is not required to use dishonorable means, subterfuge or false testimony in order to confuse and mislead the court or the jury and thus procure a verdict favorable to the defendant. *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977).

The question of effective assistance of counsel involving the physical incapacity of counsel does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions ad hoc and in each case view the circumstances as a whole. *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

The trial judge, who actually sees the lawyer's behavior, is better able than an appellate court to evaluate the overall effectiveness of representation. *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

Delay in Appointment. — Where defendant was offered an opportunity to contact counsel, and he assured the officers he would seek his own counsel to assist him, and continued to assure the officers that he intended to employ private counsel, defendant's constitutional rights were not violated by the eight days' delay in appointment of counsel. *State v. Avery*, 286 N.C. 459, 212 S.E.2d 142 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Conduct of Defendant. — The conduct of a defendant in failing either to retain counsel or to avail himself of his right to court appointed counsel, if he were indigent, may make him solely responsible for any lack of trial preparation on the part of his counsel. *State v. McDiarmid*, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

Farce and Mockery of Justice Test. — The incompetency of counsel for the defendant in a criminal prosecution is not a constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974); *State v. Mathis*, 293 N.C. 660, 239 S.E.2d 245 (1977); *State v. McDiarmid*, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

The refusal of a jailer to permit the defendant's attorney to confer with him while he was in jail is a denial of a constitutional right. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41

(1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant is entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

The rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. The denial of an opportunity to exercise a right is a denial of the right. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

And Are Not Limited to Receiving Professional Advice from Attorney. — Under this section a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Appointment of Counsel for Limited Purpose of Furnishing Advice. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. *State v. Harper*, 21 N.C. App. 30, 202 S.E.2d 795, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

The fact that a person is a defendant's lawyer, as well as his friend, does not impair his right to see the defendant at a critical time of the proceedings. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant is entitled to counsel at every critical stage of the proceedings against him. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

The guarantee of counsel only applies to "critical stages" of the prosecution, and what constitutes a critical stage is determined both from the nature of the proceedings and from the facts in each case. *State v. Hall*, 39 N.C. App. 728, 252 S.E.2d 100 (1979).

A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires assistance of counsel. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

What Constitutes Critical Stage Where Offense Involves Intoxication. — A critical stage has been reached in a defendant's case when, immediately after officers have interrogated the defendant and conducted their test for sobriety, they charge him with the offense of driving while intoxicated. The denial of counsel at this point makes it impossible for a defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor — the only means by which defendant might prove his innocence. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under § 20-138 depends upon whether he is intoxicated at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Denial of Right Resulting in Irreparable Prejudice. — The denial of a request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication, is a denial of a constitutional right resulting in irreparable prejudice to his defense. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Defendant Entitled to Representation at Trial. — Where defendant had waived his right to have assigned counsel at the preliminary hearing, but made a specific request for a lawyer prior to the selection of the jury at his trial in the superior court, he was entitled to be represented by counsel. *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

The trial judge must make an express finding as to defendant's indigent or nonindigent condition. *State v. Pickens*, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Defendant is entitled to a detailed investigation into his economic situation. *State v. Pickens*, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

When Defendant Prejudiced by Insufficient Inquiry. — Although it was incumbent upon the trial court to make a more sufficient inquiry into defendant's financial status and to determine the question of his indigency, defendant was not prejudiced unless he could show that he did not voluntarily and intelligently waive counsel. *State v. Pickens*, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Facts Insufficient to Sustain Finding of Nonindigency at Time of Trial. — The fact that the defendant was a painter capable of earning \$60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel, either privately or by court appointment, is not sufficient to sustain a finding that he was not indigent at the time of trial and, therefore, not entitled to a court-appointed attorney when it was requested at the trial. *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Denial of counsel without evidence to support a finding of nonindigency entitles defendant to a new trial. *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Waiver of Right. —

When the voir dire evidence is conflicting and contradictory on the question of whether a defendant waived his right to counsel, it is incumbent upon the trial judge to weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact. *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976).

Failure to ask for a lawyer does not constitute a waiver of a defendant's right to counsel. *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976).

When the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976).

A defendant in a criminal proceeding whether at trial or in pretrial proceedings may waive his right to counsel if he does so freely and understandingly and with full knowledge of his right to be represented by counsel. *State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978).

Indigent Defendant May Waive Right. — The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

Determining Indigency. — The theory that right to counsel has been denied because of absence of definite standards for determining indigency has been rejected by the Court of Appeals. *State v. Smith*, 27 N.C. App. 379, 219 S.E.2d 277 (1975).

Defendant Has Right to Represent Himself. — A defendant in a criminal proceeding has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972); *State v. Smith*, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

A defendant on the trial of a criminal case, including a coram nobis proceeding at which the defendant is present and witnesses are to be examined and cross-examined, has a right to conduct and manage his own case pro se. The right to act pro se is a right arising out of the federal Constitution and not the mere product of legislation or judicial decision. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

Defendant appearing pro se by his own choice does so at his peril and does not automatically become a ward of the court. *State v. McDougald*, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Rule Requiring Objection Applies to Unrepresented Defendant. — Unless necessary to obviate manifest injustice, the rule applicable to a represented defendant, that the admission of incompetent evidence alone is not ground for a new trial where there was no objection at the time the evidence was offered, applies equally to an unrepresented nonindigent defendant. *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858 (1972).

Defendant May Be Required to Reimburse State for Costs of Counsel. — A condition of probation requiring the defendant to reimburse the State for cost of court-appointed counsel does not infringe upon defendant's constitutional right to counsel. *State v. Foust*, 13 N.C. App. 382, 185 S.E.2d 718 (1972), overruled on another point, *State v. Young*, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Accused is constitutionally guaranteed counsel at an in-custody lineup identification. *State v. Ingram*, 20 N.C. App. 35, 200 S.E.2d 417 (1973).

Accused must be warned of his right to counsel during a lineup. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

When counsel is not present at the lineup, testimony of witnesses that they identified the accused at the lineup is rendered inadmissible, and any in-court identification is also rendered inadmissible unless the trial judge first determines on a voir dire hearing that the in-court identification is of independent origin and is untainted by the illegal lineup. *State v. Ingram*, 20 N.C. App. 35, 200 S.E.2d 417 (1973).

Unless presence of counsel at a lineup is understandingly waived by the accused, testimony concerning the lineup must be excluded in absence of counsel's attendance. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Out-of-Court Examination of Photographs. — Right to counsel's presence is not extended to out-of-court examinations of photographs which include a suspect, whether he is in custody or at liberty. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Viewing Photographs. — An accused has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether the suspect is at liberty or in custody at the time. *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326 (1975).

There are no set rules to determine whether a defendant has been deprived of effective assistance of counsel; rather each case must be approached upon an ad hoc basis, viewing circumstances as a whole in order to determine this question. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

Effective Legal Representation Provided. — Notwithstanding the defense attorney's hearing disability, his efforts and the assistance of co-counsel provided defendant with effective legal representation throughout the criminal proceedings. *State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978).

The question of alleged failure of counsel to render effective representation can be considered on direct appeal. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978).

Right to Effective Assistance of Counsel not Denied. — In the absence of any showing that the withdrawal of a motion to consolidate for trial charges against two defendants in any way prejudiced defendant's case and denied him his right to effective counsel, there was no error in the denial of the motion to continue. *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

V. SELF-INCRIMINATION.

Scope of Protection. —

The protection against self-incrimination is not limited to admissions that would subject a witness to criminal prosecution; the privilege also extends to admissions that may only tend to incriminate. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

The privilege afforded against self-incrimination not only extends to answers that would in themselves support a conviction under a criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Liberal Construction. —

The constitutional guaranties against self-incrimination should be liberally construed. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

A defendant has a right not to be compelled to be a witness against himself in any criminal case. *State v. Wills*, 293 N.C. 546, 240 S.E.2d 328 (1977).

Guaranty Extends to any Proceedings, etc. —

The privilege against self-incrimination may be exercised by a witness in any proceeding. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Waiver of Privilege. —

A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that

waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *State v. Wills*, 293 N.C. 546, 240 S.E.2d 328 (1977).

Defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974).

Defendant's silence in the rightful exercise of his privilege against self-incrimination may not be considered an admission of the truth of incriminating statements made in defendant's presence by a prospective State's witness in response to an officer's questions. *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974).

A defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975).

Adverse comments on a defendant's failure to testify at trial are impermissible. *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975).

Defendant Testifying May Be Cross-Examined on In-Custody Statements. — A trial court may properly allow the solicitor to cross-examine defendant with reference to in-custody statements for the purpose of impeaching defendant's trial testimony, notwithstanding the fact that defendant was not represented by counsel and had not waived the right to counsel when the statements were made. *State v. Nobles*, 14 N.C. App. 340, 188 S.E.2d 600, cert. denied, 281 N.C. 626, 190 S.E.2d 472 (1972).

Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant had not voluntarily turned himself in to the police, and defendant had already testified to the contrary. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

Identifying Physical Characteristics. — Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and are outside the protection of the privilege against self-incrimination. *State v. Greene*, 12 N.C. App. 687, 184 S.E.2d 523 (1971), appeal dismissed, 280 N.C. 303, 186 S.E.2d 177 (1972).

Confessions. —

Where a defendant pleads drunkenness as a bar to the admissibility of his confession, unless defendant's intoxication amounts to mania — that is, unless he is so drunk as to be unconscious of the meaning of his words — his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, and is a question exclusively

for the jury's determination. *State v. McClure*, 280 N.C. 288, 185 S.E.2d 693 (1972); *State v. Williams*, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

The fact that the technical procedural requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) are demonstrated by the prosecution does not, standing alone, control the question of whether a confession was voluntarily and understandingly made, but the answer to this question must be found from a consideration of the entire record. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975).

The ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975); *State v. Garnett*, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975).

Whether the conduct and language of investigating officers amounted to such threats or promises as to render a subsequent confession involuntary is a question of law reviewable on appeal. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975).

When the State offers a confession in a criminal trial and defendant objects, the competency of the confession must be determined by the trial judge in a preliminary inquiry in the absence of the jury. *State v. Garnett*, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975).

Trial judge's findings as to the voluntariness of a confession, and any other facts which determine whether it meets the requirements for admissibility, are conclusive if they are supported by competent evidence in the record. *State v. Garnett*, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975).

When there is no conflict in the evidence on voir dire, it is not error to admit a confession without making specific findings. *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976).

If the State offers a part of a confession, the accused may require the whole confession to be admitted into evidence. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Admission of Confession Not Violative of Right against Self-Incrimination. — When a defendant has been given all warnings required by the State and federal rules of evidence, and he understands them, freely and voluntarily waives the right to have right to counsel, and freely and voluntarily makes a confession, then the admission of this confession in evidence at a jury trial does not violate defendant's right against self-incrimination. *State v. Thompson*, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (1974).

Where the trial court found that defendant was fully apprised of his rights to counsel and to remain silent, that he said he understood them, that he did not appear to be under the influence of drugs, and that he knew what he was doing, the trial court ruled correctly that his subsequent confession was admissible. *State v. Travatello*, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

In-Custody Statements. —

Procedural safeguards effective to secure the privilege against self-incrimination are necessary whenever law-enforcement officers question a person who has been taken into custody or otherwise deprived of his liberty in any significant way. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975).

As a result of the decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), a number of procedural safeguards must be employed prior to an in-custody interrogation. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975).

In determining whether an in-custody statement is voluntarily and understandingly made, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. *State v. Travatello*, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

In a prosecution for armed robbery, the testimony of a witness employed as a dispatcher by the police department relating defendant's in-custody confession of guilt was admissible notwithstanding the dispatcher's failure to advise defendant of his constitutional rights, where the dispatcher questioned defendant while visiting a relative who shared defendant's cell, dispatcher was not in any way acting as a police officer and was not, in fact, a police officer. *State v. Johnson*, 29 N.C. App. 141, 223 S.E.2d 400, cert. denied, 290 N.C. 310, 225 S.E.2d 831 (1976).

When a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a voir dire hearing to determine whether the confession was voluntarily made and whether the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) have been met. *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976).

Where defendant contended that his lack of sleep and food and his heavy use of drugs and alcohol shortly before his periods of interrogation rendered any in-custody statement involuntary, but where after an extensive voir dire hearing, the trial court found that defendant was not interrogated on the evening of his arrest because he was drunk, that defendant was not under the influence of intoxicating liquors or drugs and was furnished food and coffee when interrogated on the following day, that defendant was read his rights before

questioning began, and that defendant signed a waiver of his rights, the in-custody statement was freely, understandingly and voluntarily made and was therefore properly admitted into evidence. *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 429 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Silence in Face of Accusation, etc. —

If police officers properly warn an accused of his constitutional rights, his silence may not be used against him. *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975).

Admissibility of In-Custody Silence for Purpose of Impeachment. — See *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975).

Custodial admonitions to an accused by police officers to tell the truth, standing alone, do not render a confession inadmissible. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975).

The privilege against self-incrimination can be claimed only by the witness, and when it is claimed, it is guaranteed by the Fifth Amendment to the Constitution of the United States, as well as by this section. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Plea of Guilty. — If a plea of guilty or nolo contendere is sustained, it must appear affirmatively that it was entered voluntarily and understandingly. *State v. Ford*, 281 N.C. 62, 187 S.E.2d 741 (1972).

A plea of guilty or of nolo contendere, unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated. *State v. Ford*, 281 N.C. 62, 187 S.E.2d 741 (1972).

Evidence to the effect that a plea of nolo contendere was entered voluntarily and understandingly should have been developed fully and a finding to that effect made in order to safeguard defendant's rights, to protect his counsel from charges of unauthorized action, and generally to protect the plea and judgment from collateral attack in State post-conviction and federal habeas corpus proceedings. *State v. Ford*, 281 N.C. 62, 187 S.E.2d 741 (1972).

Testimony Cured Failure to Inquire as to Voluntariness of Plea. — When the entire record was considered, a deficiency in the court's inquiries and in defendant's responses in determining whether the defendant's plea of nolo contendere was entered voluntarily and understandingly was cured by defendant's testimony on the occasion of his arraignment and plea which disclosed affirmatively that he had no defense to the crime for which he was indicted. *State v. Ford*, 281 N.C. 62, 187 S.E.2d 741 (1972).

Court Determines Applicability of Immunity. — The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself. His say-so does not of itself establish the hazard of incrimination. It is for the court to say whether

his silence is justified and to require him to answer if it clearly appears to the court that he is mistaken. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

And Applicability Depends upon Peculiarities of the Case. — If the witness, upon interposing his claim of immunity, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evidence from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Forced Production of Incriminating Documents, etc. —

Defendant was not compelled to do anything.

Sec. 24. *Right of jury trial in criminal cases.*

Editor's Note. —

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

Common-Law Principle. — It is a fundamental principle of the common law, declared in Magna Charta and incorporated in this section, that no person shall be convicted of any crime but by the unanimous verdict of a jury in open court. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Defendant is entitled as of right, etc. —

In accord with original. See *State v. Williams*, 295 N.C. 655, 249 S.E.2d 709 (1978).

Jury Must Have 12 Persons. — It is elementary that the jury provided by law for the trial of indictments is composed of 12 persons; a less number is not a jury. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

A verdict by 11 jurors is a nullity despite defendant's failure to assign his conviction by 11 jurors as error. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

If imprisoned under a sentence imposed after conviction by 11 jurors a defendant would be entitled to his release upon a writ of habeas corpus. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Not More. — If a defendant in a felony trial cannot consent to a trial by fewer than 12 jurors, it is clear that he cannot assent to deliberations

He voluntarily made and kept the records involved, and they were seized by lawful process without his being required to say or do anything. Although the constitutional privilege against self-incrimination applies to the production of papers so that if the accused is compelled to produce them the privilege is violated, lawful seizure of such evidence (as, for example, pursuant to a valid search warrant) obviously differs from requiring the accused to produce it and does not violate the privilege. *State v. Downing*, 31 N.C. App. 743, 230 S.E.2d 581 (1976).

Section 15A-977(a) requires an affidavit, but requiring the affidavit does not amount to compelling defendant to be a witness against himself in a criminal case in violation of the Fifth Amendment of the United States Constitution and North Carolina Const., Art. I, § 23. *State v. Gibson*, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

by more than 12. *State v. Rowe*, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

Jury Trial Cannot Be Waived, etc. —

It is rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the superior court as long as his plea remains "not guilty." *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

When a defendant pleads not guilty in cases where a trial by jury is guaranteed by the organic law, he must be tried by a jury of 12 men, and he cannot waive it. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

But Plea of Guilty Renders Jury Unnecessary. — A defendant may plead guilty, or nolo contendere, or autrefois convict, and the impaneling of a jury is unnecessary. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Unanimous Verdict Required. —

No person can be finally convicted of any crime except by the unanimous consent of 12 jurors who have been duly impaneled to try his case. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

It has never been doubted that the Constitution of this State requires a unanimous verdict for a valid conviction for any crime. *State v. Williams*, 286 N.C. 422, 212 S.E.2d 113 (1975).

Poll of Jury. —

The right to have the jury polled is surely one

of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise only a mode, more satisfactory to the prisoner, of ascertaining the fact that it is the verdict of the whole jury. *State v. Inland*, 278 N.C. 42, 178 S.E.2d 577 (1971).

By having the jury polled, a defendant can ascertain if there has been any misunderstanding of the requirement of unanimity by any juror. *State v. Inland*, 278 N.C. 42, 178 S.E.2d 577 (1971).

The function of the jury poll is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented. *State v. Asbury*, 291 N.C. 164, 229 S.E.2d 175 (1976).

A defendant has a constitutional right, upon timely request, to have the jury polled as a corollary to his right to a unanimous verdict. *State v. Asbury*, 291 N.C. 164, 229 S.E.2d 175 (1976).

Poll Defined. — A criminal defendant's right to have the jury polled is the right to have questions propounded to the jurors, individually, concerning whether each juror assented and still assents to the verdict tendered to the court. *State v. Asbury*, 291 N.C. 164, 229 S.E.2d 175 (1976).

Only two questions are necessary to elicit whether the juror assented in the jury room and still assents in open court to the jury verdict. The first is: "Was this your verdict?" The addition of the second question "Is this now your verdict?" relates to the same time period addressed in the third question, "Do you still agree and assent thereto?" The second and third questions refer to the present in-court state of mind of the juror and serve only to emphasize by repetition that the crucial assent is the juror's assent to the verdict when he returns to the courtroom. *State v. Asbury*, 291 N.C. 164, 229 S.E.2d 175 (1976).

Not Required in Absence of Request. — In the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous. *State v. Inland*, 278 N.C. 42, 178 S.E.2d 577 (1971).

Right of Juror to Dissent. —

Any juror may dissent from a verdict, to which he has agreed in the jury room, at any time before it is received and entered up. *State v. Asbury*, 291 N.C. 164, 229 S.E.2d 175 (1976).

A jury verdict is not defective if it appears that the juror eventually freely assented to the verdict. *State v. Asbury*, 291 N.C. 164, 229 S.E.2d 175 (1976).

Failure to Charge Jury That Verdict Must Be Unanimous. — Since the defendant has the right to have the jury polled, there is no apparent reason why the trial judge should be required in every case to instruct the jury that its verdict must be unanimous. *State v. Inland*, 278 N.C. 42, 178 S.E.2d 577 (1971).

A holding that failure of the trial judge to instruct the jury that its verdict must be unanimous is prejudicial error is unnecessary because in North Carolina a defendant has an absolute right to have the jury polled. *State v. Inland*, 278 N.C. 42, 178 S.E.2d 577 (1971).

Where the jury was polled and all jurors assented to the verdict in open court, defendant was assured that all jurors agreed with the verdict rendered, and the omission of the charge on unanimity was entirely harmless. *State v. Inland*, 278 N.C. 42, 178 S.E.2d 577 (1971).

A defendant has no vested right to a particular juror. *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

Exclusion of Age Group from Jury List. — The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Challenge of Jurors for Opposition, etc. —

As to exclusion of jurors who voiced objections to death penalty, see *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

Right to Reject Prejudiced Jurors. — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in his favor. *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. *State v. Bernard*, 288 N.C. 321, 218 S.E.2d 327 (1975).

Evidence of Racial Exclusion Insufficient. — Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded people of defendant's race from jury which is not supported by the record fails to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975); death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Presence of an alternate in the jury room during the jury's deliberations violates this section and § 9-18 and constitutes reversible

error per se. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975); *State v. Rowe*, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

If the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been any discussion of the case. If the answer is "no," the alternate will be excused and the jury returned to consider its verdict. If the answer is "yes," there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975).

If alternate juror's presence in jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity, then the rule of per se reversible error is not applicable. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975).

The presence of an alternate juror, either during the entire period of deliberation preceding the verdict, or his presence at any time during the deliberations of the 12 regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the defendant's counsel consented, or failed to object, to the presence of the alternate. *State v. Rowe*, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

At any time an alternate juror is in the jury room during deliberations he participates by his presence and, whether he says little or nothing,

his presence will void the trial. *State v. Rowe*, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

Separate Provisions for Petty Misdemeanors. —

The only exception to the rule that nothing can be a conviction but the verdict of a jury is the constitutional authority granted the General Assembly to provide for the initial trial of misdemeanors in inferior courts without a jury, with trial de novo by a jury upon appeal. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Appellate Court May Increase Punishment in Trial De Novo. — Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Harrell*, 281 N.C. 111, 187 S.E.2d 789 (1972).

Jury Trial Not Necessary in Action to Revoke Driver's License. — Since an action to revoke a driver's license is a civil action, jury trial is not necessary. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

Subsection (c) of § 15A-928 does not violate the right to jury trial embodied in Art. I, § 24 of the State Constitution. See *State v. Smith*, 291 N.C. 438, 230 S.E.2d 644 (1976).

Applied in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974); *State v. Parker*, 29 N.C. App. 413, 224 S.E.2d 280 (1976); *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977).

Quoted in *Lofton v. Lofton*, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Sec. 25. *Right of jury trial in civil cases.*

Common Law. — The right to trial by jury guaranteed by this section applies only to cases in which the prerogative existed at common law or by statute in existence at the time the Constitution was adopted. In re Appeal of Taylor, 25 N.C. App. 642, 215 S.E.2d 789 (1975).

Right to a jury trial is guaranteed, etc. —

In accord with 2nd paragraph in original. See *Mathias v. Brumsey*, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

This section guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

This section has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

Application of Right. — The right to jury trial preserved under this section applies only in cases in which the prerogative existed at common law or by statute at the time the State Constitution was adopted. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, appeal dismissed, 282 N.C. 426, 192 S.E.2d 837 (1972).

Similarity to First Sentence of Art. I, § 19 of Constitution of 1868. — The provisions of this section are similar to the provisions of the first sentence of Art. I, § 19 of the Constitution of 1868. In re Annexation Ordinance, 284 N.C. 442, 202 S.E.2d 143 (1974).

No Right to Jury Trial in Proceeding to Discipline Attorney. — This State has never had a statute which expressly conferred upon an attorney the right to a trial by jury in a judicial disciplining or disbarment proceeding. Since no such right existed at common law, or by statute at the time the State Constitution was adopted,

and is not now provided for by statute, an attorney's motion for a trial by jury is properly denied. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, appeal dismissed, 282 N.C. 426, 192 S.E.2d 837 (1972).

Or in Action to Revoke Driver's License. — Since an action to revoke a driver's license is a civil action, jury trial is not necessary. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

Insanity Proceedings. — The right to trial by jury did not exist at common law in insanity proceedings and is thus not required under this section. In re Appeal of Taylor, 25 N.C. App. 642, 215 S.E.2d 789 (1975).

How Jury Trial May Be Waived. — A party may waive his right to jury trial by (1) failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, (4) by failing to demand a jury trial pursuant to § 1A-1, Rule 38(b). Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971).

It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

There can be no presumption of a waiver of trial by jury where such a trial is provided for by law. Thus, in the absence of an express

agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Shearin v. National Indem. Co., 27 N.C. App. 88, 218 S.E.2d 207 (1975).

A compulsory reference, under former § 1-189, did not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial was only upon the written evidence taken before the referee. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Applied in Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976), aff'd, 292 N.C. 192, 232 S.E.2d 687 (1977).

Stated in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

Quoted in Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

Sec. 27. *Bail, fines, and punishments.*

Editor's Note. —

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

Punishment Is Province of Legislature. — It is within the province of the General Assembly and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

In accord with 1st paragraph in original. See State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

In accord with 3rd paragraph in original. See State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971); State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

A sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. State v. Cradle, 281 N.C. 198,

188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

A prison sentence which does not exceed the maximum authorized by statute is constitutionally valid. State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972).

When the sentence imposed is within statutory limits it cannot be considered excessive, cruel or unreasonable. State v. Harris, 27 N.C. App. 385, 217 S.E.2d 306 (1975).

Unless Punishment Provisions of Statute Itself, etc. —

In accord with original. See State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

The contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization is not a criminal proceeding within the meaning of this section. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Miscellaneous Cases. —

It is within the province of the General Assembly to prescribe maximum punishments which may be imposed upon those convicted of crime. It is not for courts to say that the policy judgment of the General Assembly with respect to punishment for armed robbery is wrong. Armed robbery is a crime of violence and those who take the risk must assume the consequences involved. The punishment

provisions of § 14-87 are constitutionally valid. *State v. Legette*, 292 N.C. 44, 231 S.E.2d 896 (1977).

Applied in *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976).

Cited in *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972); *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973); *State v. Woodson*, 287 N.C. 578, 215 S.E.2d 607 (1975); *Bolding v. Holshouser*, 575 F.2d 461 (4th Cir. 1978).

Sec. 28. Imprisonment for debt.**What Constitutes Debt. —**

Taxes which are imposed are not contractual obligations of the taxpayer to the State, and do not constitute a debt within the meaning of the Constitution. *State v. Locklear*, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

Section Only Applicable to Actions Arising out of Contract. — This section, which prohibits imprisonment for debt, is only applicable to actions arising out of or founded upon contract. *State v. Locklear*, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

Payment of Restitution Is Valid Condition for Suspension of Sentence. — Subject to the prohibition contained in this section against imprisonment for debt, except in cases of fraud, payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for suspension of sentence. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Or for Acceptance of Plea Bargain. — Payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for acceptance of a plea bargain. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Restitution Must Be to Specific Party. — When restitution is ordered as result of a plea bargain it must be to a specific aggrieved party and this party must be named in the judgment. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

The remedy of specific performance of a separation agreement contemplating enforcement by civil contempt proceedings is not available in this State. *Sainz v. Sainz*, 36 N.C. App. 744, 245 S.E.2d 372 (1978).

A separation agreement which provided for support payments, and which was not incorporated into a court order, could not be enforced by specific performance since it was apparent that, due to the defendant's prior history of nonpayment, plaintiff sought a specific performance decree to compel the defendant to pay under threat of being jailed for contempt, and since separation agreements which have not been incorporated into a judgment cannot be enforced by contempt proceedings. *Moore v. Moore*, 38 N.C. App. 700, 248 S.E.2d 761 (1978).

Extra-judicial Separation Agreement Enforceable Only by Suit for Breach of Contract. — The enforcement of support payments provided in an extra-judicial separation agreement is accomplished as in the case of any other civil contract, i.e., through an action for breach of the contract seeking a judgment for sums due. Such an action, sounding in contract, is not enforceable by execution in personam in the form of imprisonment for civil contempt for noncompliance, by reason of the constitutional prohibition against imprisonment for debt. *Sainz v. Sainz*, 36 N.C. App. 744, 245 S.E.2d 372 (1978).

Sec. 30. Militia and the right to bear arms.

Cited in *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

Sec. 32. Exclusive emoluments.

Denying a nonprofit corporation the right to construct and operate its proposed hospital on its own property with its own funds with adequate staff and equipment is a grant to existing hospitals of exclusive privileges forbidden by this section. In re Certificate of

Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Cited in Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977).

*Sec. 34. Perpetuities and monopolies.***The common-law rule, etc. —**

The common-law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of this section. North Carolina Nat'l Bank v. Norris, 21 N.C. App. 178, 203 S.E.2d 657 (1974).

Denying a nonprofit corporation the right to construct and operate its proposed hospital on its own property with its own funds with adequate staff and equipment establishes a monopoly in the existing hospitals contrary to the provisions of this section. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Plaintiff's Monopolistic Conduct Not Defense to Action Relating to Unfair

Competition. — Even if plaintiff's conduct in protecting its property should be considered a monopolistic practice, it is not a defense to an action for injunctive relief and compensatory damages for alleged unfair competition where defendants' conduct has been determined to be unfair competition. United Artists Records, Inc. v. Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973), cert. denied, sub nom., Records v. Tape Corp., 284 N.C. 255, 200 S.E.2d 653 (1974).

Cited in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Sec. 35. Recurrence to fundamental principles.

Cited in Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); In re Reddy, 16 N.C. App. 520, 192

S.E.2d 621 (1972); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Sec. 36. Other rights of the people.

Instruction Informing Jury of Death Penalty. — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United

States and by N.C. Const., Art. I, §§ 19, 23 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Cited in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972).

ARTICLE II

LEGISLATIVE

Section 1. Legislative power.

General Assembly Is Possessed of Full Legislative Powers. — Under the North Carolina Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by

express constitutional provision or necessary implication therefrom. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

To Legislate for Protection of Health, Safety, Morals and General Welfare. — The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Questions of Public Policy Are for Legislative Determination. — Absent constitutional restraint, questions as to public policy are for legislative determination. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

The wisdom of an enactment is a legislative and not a judicial question. The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Whether the public policy and program established by the North Carolina Housing Finance Agency Act (§ 122A-1 et seq.) is wise or unwise is for determination by the General Assembly. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Legislative function cannot be delegated. —

In accord with 2nd paragraph in original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

The legislature may not delegate its power to make laws even to an administrative agency of the government. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Distinction between Delegating Power to Make Law and Conferring Authority as to Its Execution. — There is a distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Effect of Section. — The effect of N. C. Const., Art. I, § 6 and this section is to elucidate the circumstances in which delegation of legislative powers is permissible. *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

Modern Legislatures May Delegate Limited Legislative Powers. — A modern legislature must be able to delegate — in proper instances — a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving

numerous details with which the legislature cannot deal directly. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Legislature May Delegate Portion of Power under Prescribed Standards. —

The people, in this section, have conferred their legislative power upon the General Assembly which may not transfer it to another officer or agency without the establishment of such standards for guidance so as to retain in its own hands the supreme legislative power. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

The legislature may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

"Adequate Guiding Standards Required." — The constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Purpose of Test. — The purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Application of Test. — The key to an intelligent application of the adequate guiding standards test is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying

circumstances. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 693, 249 S.E.2d 402 (1978).

Source of Standards. — In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. Such declarations need be only as specific as the circumstances permit. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Determining Adequacy by Existence of Procedural Safeguards. — Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to insure that the decision-making by the agency is not arbitrary and unreasoned. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. The presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

But It Cannot Delegate Absolute Discretion to Apply, etc. —

In accord with original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974); *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

It Must Declare Policy, Fix Legal Principles, etc. —

In accord with original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974); *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974); *State ex rel. Dorothea Dix Hosp. v. Davis*, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Standards Are Unnecessary When Power Is Delegated in the Constitution. — The principle that the General Assembly may not transfer its legislative power without the establishment of standards for guidance has no application to a direct delegation by the people, themselves, in the Constitution of the State, of any portion of their power, legislative or other. In such case,

the Supreme Court looks only to the Constitution to determine what power has been delegated. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Legislature Cannot Restrict Power of Succeeding Legislature. — An act of the General Assembly is legal unless the Constitution contains a prohibition against it. One legislature cannot restrict or limit by statute the right of a succeeding legislature to exercise its constitutional power to legislate in its own way. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1971).

Legislature May Delegate Power to Determine Facts. —

In accord with 3rd paragraph in original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

In accord with 4th paragraph in original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Where a municipal ordinance required the board of adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

The General Assembly, having itself declared the policy to be effectuated and having established the broad framework of law within which it is to be accomplished and standards for the guidance of the administrative agency, may delegate to such agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

The legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974); *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

It is not necessary for the legislature to ascertain the facts of, or to deal with, each case. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature that necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the

determination of facts to which the policy as declared by the legislature shall apply. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Delegation of Power to Grant Professional or Occupational Licenses. — In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. *Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy*, 21 N.C. App. 156, 204 S.E.2d 38 (1974); *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

Delegation of Power to Private Corporation. — The legislature may not vest in a private corporation the authority to determine "in its absolute or unguided discretion" the price at which another, with whom it has no contractual relation, may sell to a willing buyer an article lawfully acquired and owned by him. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

The "nonsigner" provision of former § 66-56, extending the force and effect of a "fair trade" contract to a seller not a party thereto, was unconstitutional, because it delegated legislative power to a private corporation, in violation of this section. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Power May Be Delegated to Municipalities. — Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

The general rule that legislative power, vested in the General Assembly, may not be delegated is subject to an exception permitting the delegation to municipal corporations and to counties of power to legislate concerning local problems. *Porter v. Suburban San. Serv., Inc.*, 283 N.C. 479, 196 S.E.2d 760 (1973).

The General Assembly cannot delegate to a city or county more extensive power than it possesses. *In re Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

Though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing. *In re Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

The power to zone is the power originally vested in the General Assembly to legislate with reference to the use which may be made of

land and the structures which may be erected or located thereon. *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971).

And Is Subject to Constitutional Limitation on Interference with Property Rights. — Power to zone rests originally in the General Assembly, but this power is subject to the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners. *In re Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

Municipality May Not Delegate Power to Zone to Board of Adjustment. — The legislative body of a municipal corporation, in which the General Assembly has vested its power to zone, may not delegate the power to zone to the municipal board of adjustment. *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971).

Discretionary Right to Enlarge Corporate Limits. — In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in the special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. I, § 6 or this section. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

There is no constitutional provision prohibiting the creation of a municipality by an act of the General Assembly. A fortiori, by a special act, it may constitutionally enlarge the boundaries of a town which it has created. It may also provide statutory procedures for extending the corporate limits of a municipality organized and existing under the laws of the State. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

The enlargement of municipal boundaries by the annexation of new territory, resulting in the extension of municipal corporate jurisdiction, is a legitimate subject of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature, and an act of annexation is valid which authorizes the annexation of territory without the consent of its inhabitants. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

Standards Must Be Set Up for Administrative Board. —

When the General Assembly delegates to

administrative officers and agencies its own power to prescribe detailed administrative rules and regulations governing the right of individuals to engage in a trade or profession, the statute granting such authority must lay down or point to a standard for the guidance of the officer or agency in the exercise of his or its discretion. Otherwise, such statute will be deemed an unlawful delegation by the General Assembly of its own authority. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

In the Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act (§ 131-138 et seq.), where the legislature declared the policy of the State, established the broad framework of law within which it is to be accomplished, and established standards and requirements which the Commission (now Department) was to observe in determining the eligibility of each proposed project for the contemplated financial aid, there was no delegation of legislative power such as would require the conclusion that the act, in its entirety, is unconstitutional. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Section 90-57.1 contains no specific guidelines for the Board to follow. It merely refers to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession. *Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy*, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

And Thus It Violates Section. — Without guidelines meeting the constitutional standards of certainty, § 90-57.1 is an unlawful attempt to delegate legislative authority and is in violation of the North Carolina Constitution. *Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy*, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

Section 90-88 Contains More Than Adequate Legislative Guidelines. — An examination of § 90-88 reveals that the legislature has imposed guidelines upon the rescheduling of controlled substances that are more than adequate. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

And Is Proper Delegation of Authority to Determine Facts. — Section 90-88 does not delegate the authority to define crimes; rather it is a delegation of authority to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

The burden of proof provision of the Rules Governing Admission to the Practice of Law provides for the orderly determination of an applicant's moral character, so that provision is within the legitimate rule-making power constitutionally delegated to the Board of Law Examiners in § 84-24. In *re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

Chapter 143, Article 7 Is Not Unconstitutional in Contravention of This Section. — See *State ex rel. Dorothea Dix Hosp. v. Davis*, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Exchange of Land by Board of Education. — There is nothing in the Constitution which prohibits a board of education from exchanging land which it owns for other land for school purposes. *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 217 S.E.2d 650 (1975).

The Coastal Area Management Act of 1974 properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

The authority delegated to the Coastal Resources Commission is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies, and procedural safeguards. The General Assembly properly delegated to the Commission the authority to prepare and adopt State guidelines for the coastal area. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Quoted in In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973); *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Cited in In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978).

Sec. 24. *Limitations on local, private, and special legislation.*

A statute is either "general" or "local," etc. —

In accord with original. See *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

What Are General Laws. —

For the purpose of determining whether an enactment is a general law intent must be found

from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied and the actual purpose to be accomplished. In *re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

A law is general if any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

What Are Local Laws. —

A local act is an act applying to fewer than all counties, in which the affected counties do not rationally differ from the excepted counties in relation to the purpose of the act. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

A local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

The constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

The distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Courts Look Beyond Form, etc. —

In accord with original. See *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

Classifications, etc. —

In accord with 6th paragraph in original. See *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied — that the legislature must be held rigidly to the choice of regulating all or none. It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

While substantial distinctions are essential in classification, the distinctions need not be scientific or exact. The legislature has wide discretion in making classifications. *Adams v.*

North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act. — Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Jurisdiction over Divorce. — Under this section jurisdiction over the subject matter of divorce is given only by statute. *Williams v. Williams*, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Meaning of "Trade". —

In accord with 3rd paragraph in original. See *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

In accord with 4th paragraph in original. See *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

"Trade" refers to a business venture for profit. *Nelson v. North Carolina State Bd. of Alcoholic Control*, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

Private profit is an inherent element of the concept of trade as used in subsection (1)(j) of this section. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

A local act that authorizes or prohibits the sale of beer and wine is a local act regulating or governing a trade and is void. *Nelson v. North Carolina State Bd. of Alcoholic Control*, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

The retail sale of beer and wine is a "trade" within the meaning of this Constitution. *Nelson v. North Carolina State Bd. of Alcoholic Control*, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

Where substantial effect of local act is to regulate the sale of alcoholic beverages, its effect on trade is not merely incidental. *Nelson v. North Carolina State Bd. of Alcoholic Control*, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

The purchase, sale and serving of alcoholic beverages by a licensed restaurateur constitutes "trade" within the meaning of subsection (1)(j) of this section. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

Option to Sell Mixed Beverage Is Local Act. — A statute which authorized an election in Mecklenburg County to determine whether mixed beverages would be sold by the drink in that county was held to be a local act regulating trade and therefore unconstitutional and void as violative of subsection (1)(j) of this section. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

Subdivision (55) of former § 153-9 is a home rule statute, applicable throughout the State. It enables the county commissioners of every county to enact ordinances in the exercise of the general police power within the prescribed territory just as other statutes enable the governing bodies of cities and towns to enact ordinances in the exercise of the general police power within their corporate limits. Such statutes are upheld as general laws and therefore valid notwithstanding that they regulate Sunday trade. Subdivision (55) of former § 153-9 is a general law and therefore does not contravene N.C. Const. 1868, Art. II, § 29. *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970).

As Is Session Laws 1945, Chapter 936. — Session Laws 1945, c. 936, which purports to grant discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore Counties to refuse to issue a license for the sale of fortified and unfortified wines within the corporate limits of such municipalities, is a local act regulating trade in violation of subsection (1)(j) of this section. *Food Fair, Inc. v. City of Henderson*, 17 N.C. App. 335, 194 S.E.2d 213 (1973).

General laws regulating the change of a person's name, and prescribing a procedure

therefor, do not abrogate the common-law rule which allows a person to change his name without resort to legal procedure or repeal it by implication or otherwise; they merely affirm and are in aid of the common-law rule and provide an additional method of effecting a change of name and, more importantly, provide a method for recording the change. *In re Mohlman*, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Session Laws 1967, c. 506, a local act relating to municipal eminent domain procedures, does not involve any of the forbidden subjects listed in this section. *City of Durham v. Manson*, 21 N.C. App. 161, 204 S.E.2d 41, modified on other grounds, 285 N.C. 741, 208 S.E.2d 662 (1974).

The Coastal Area Management Act of 1974 is a general law which the General Assembly had power to enact. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Quoted in *Thompson v. Whitley*, 344 F. Supp. 480 (E.D.N.C. 1972).

Cited in *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971); *Variety Theatres, Inc. v. Cleveland County*, 282 N.C. 272, 192 S.E.2d 290 (1972).

ARTICLE III

EXECUTIVE

Sec. 2. *Governor and Lieutenant Governor: election, term, and qualifications.*

(2) **Qualifications.** No person shall be eligible for election to the office of Governor or Lieutenant Governor unless, at the time of his election, he shall have attained the age of 30 years and shall have been a citizen of the United States for five years and a resident of this State for two years immediately preceding his election. No person elected to the office of Governor or Lieutenant Governor shall be eligible for election to more than two consecutive terms of the same office. (1977, c. 363, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 8, 1977, substituted "the office of the Governor or Lieutenant Governor" for "either of these two

offices" and "to more than two consecutive terms" for "to the next succeeding term" in the second sentence of subsection (2).

As subsection (1) was not changed by the amendment, it is not set out.

Sec. 5. *Duties of Governor.*

(3) **Budget.** The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.

The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus

remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures, after first making adequate provision for the prompt payment of the principal of and interest on bonds and notes of the State according to their terms, whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures. This section shall not be construed to impair the power of the State to issue its bonds and notes within the limitations imposed in Article V of this Constitution, nor to impair the obligation of bonds and notes of the State now outstanding or issued hereafter. (1977, c. 690, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 8, 1977 added the second paragraph of subsection (3).

As subsections (1) and (2) were not changed by the amendment, they are not set out.

Commutation of Sentence. — The exercise by a governor of his judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or

"arbitrary" merely because another governor might, theoretically, have reached opposite conclusions. *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1206 (1976).

Applied in *State v. Lampkins*, 286 N.C. 497, 212 S.E.2d 106 (1975).

Quoted in *Wilson v. North Carolina*, 438 F.2d 284 (4th Cir. 1971).

Cited in *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788 (1971); *State v. Vert*, 39 N.C. App. 26, 249 S.E.2d 476 (1978).

Sec. 7. *Other elective officers.*

Editor's Note. —

For article entitled, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

Applied in *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 287 N.C. 192, 214 S.E.2d 98 (1975).

Quoted in *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027 (E.D.N.C. 1978).

ARTICLE IV

JUDICIAL

Section 1. *Judicial power.*

Editor's Note. —

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

Review of Acts of General Assembly. — The courts of this State have no inherent power to review acts of the General Assembly and to declare invalid those which the courts disapprove or, upon their own initiative, find to be in conflict with the Constitution. *Green v. Eure*, 27 N.C. App. 605, 220 S.E.2d 102 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 696 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and

the General Assembly has no authority to confer such jurisdiction upon it. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Judicial Functions in Criminal Cases. — The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Grant of Discretionary Power to Parole Commission. — Section 148-62 (now repealed), insofar as it granted discretionary power to the Board of Paroles (now the Parole Commission),

was not an assignment of judicial power to the Board of Paroles in contravention of this section and N.C. Const., Art. I, § 6. *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be intrusted by the legislature to nonjudicial agencies. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Appeal from Administrative Decisions. — The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Sec. 2. *General Court of Justice.*

Cited in *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

Sec. 3. *Judicial powers of administrative agencies.*

Applied in *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Sec. 4. *Court for the Trial of Impeachments.*

Stated in *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978).

Sec. 8. *Retirement of Justices and Judges.* The General Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice, and may provide for the temporary recall of any retired Justice or Judge to serve on the court from which he was retired. The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge. (1971, c. 451, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 added the second sentence.

General Assembly Authorized to Deny Compensation to Judge Removed from Office for Wrongdoing. — The General Assembly acted well within its constitutional authority

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Quoted in *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Stated in *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978).

Cited in *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); *In re Watts*, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

under this section when it provided in § 7A-376 that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978).

Session Laws 1971, c. 451, s. 3, provides that the amendment shall be effective Jan. 1, 1973.

Sec. 9. *Superior Courts.*

Appointment of Judges. — North Carolina could by her Constitution provide for the appointment of all State judges without violating any provision of the federal Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district

from which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for the election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

The one man, one vote rule does not apply to the State judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Sec. 10. *District Courts.*

Stated in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Sec. 11. *Assignment of Judges.*

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as

prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Sec. 12. *Jurisdiction of the General Court of Justice.*

I. GENERAL CONSIDERATION.

Editor's Note. —

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

Appeal from Administrative Decisions Generally. — The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this

State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The court of appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. *Britt v. Allen*, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

The constitutional and statutory structure of our General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must go first to the superior court. *State v. Killian*, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Review in Judicial Disciplinary Proceedings. — Under this section and § 7A-32 the courts of the appellate division have power to review judicial disciplinary proceedings whether the attorney or the State has prevailed in the trial court. In *re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

The State may seek review by the appellate division of proceedings disciplining attorneys under the judicial method. However, the State may not appeal in such cases as a matter of right but must seek appellate review by petition for writ of certiorari. In *re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

The "clear and convincing" rule is the standard of proof that should be used in judicial disbarment proceedings. In *re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

Jurisdiction over Eastern Band of Cherokee in Civil Matters. — North Carolina has had civil jurisdiction over the Eastern Band of Cherokee at least since the emigration west following the Treaty of New Echota, when the Indians remaining in North Carolina became subject to the laws of the State. The fact that these Indians have since been recognized as an Indian tribe and brought under federal supervision did not remove the existing jurisdiction of the State of North Carolina. *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (1979).

The courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an occurrence on land within the Qualla Boundary. *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E.2d 577 (1979).

Applied in *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972); *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974); In *re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976).

Quoted in *Austin v. Austin*, 12 N.C. App. 286, 183 S.E.2d 420 (1971); *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Stated in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Cited in *State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971); *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

II. SUPREME COURT.

A. In General.

The jurisdiction of the Supreme Court, etc.

In accord with original. See *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

It Relates Solely to Appeals from Courts. —

In accord with 1st paragraph in original. See *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

And Does Not Include Direct Appeals from Agencies. —

In accord with original. See *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court is strictly an appellate court, its jurisdiction limited "to review upon appeal any decision of the court below upon any matter of law or legal inference." *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has supervisory jurisdiction, etc. —

Under unusual and exceptional circumstances the court will exercise power under this section to consider questions which are not properly presented according to rules. *State v. Stanley*, 288 N.C. 19, 215 S.E.2d 589 (1975).

Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice. *State v. Stanley*, 288 N.C. 19, 215 S.E.2d 589 (1975).

Direct Appeals from Utilities Commission Not Constitutionally Permissible. — The Utilities Commission being an administrative agency and not a part of the General Court of Justice, direct appeals from the Utilities Commission to the Supreme Court are not constitutionally permissible. *State ex rel. Utilities Comm'n v. VEPCO*, 21 N.C. App. 45, 203 S.E.2d 418, rev'd on other grounds, 285 N.C. 398, 206 S.E.2d 283 (1974).

Authority for a writ of error coram nobis stems from this section of the Constitution of North Carolina which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

The availability of a writ of error coram nobis in this State stems from § 4-1, which adopts the common law as the law of this State, and authority for the writ stems from this section which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970), overruled on other grounds,

Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971).

What Reviewable. —

Supreme Court must accept as conclusive the verdict of the jury, so far as the credibility of witnesses is concerned. *State v. Lampkins*, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L.Ed.2d 1216 (1976).

Supreme Court has no authority to grant a new trial or other relief to a defendant convicted of a criminal offense in a trial free from an error of law for the reason that it disagrees with the jury concerning the credibility of a witness for the State. *State v. Lampkins*, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L.Ed.2d 1216 (1976).

Supreme Court has authority to review the record on appeal and to grant a new trial or give other appropriate relief for an error of law committed by the trial court. *State v. Lampkins*, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L.Ed.2d 1216 (1976).

Writ of Error Coram Nobis. —

There is no justification for a rule that would require a person who is not in prison to obtain permission from an appellate court in order to file a petition for a writ of error coram nobis to attack collaterally a final judgment of a trial court from which no appeal was taken. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

In *re Taylor*, 230 N.C. 566, 53 S.E.2d 857 (1949), and *State v. Daniels*, 231 N.C. 509, 57 S.E.2d 653, cert. denied, 339 U.S. 954, 70 S. Ct. 837, 94 L.Ed. 1366 (1950), imposed a new requirement upon the ancient common-law writ of error coram nobis, namely, a requirement that permission be first obtained from the Supreme Court, such permission to be granted under the supervisory power presently conferred upon the Supreme Court by subsection (1) of this section. The Supreme Court has concluded that such requirement is neither necessary nor desirable under present conditions with reference to a final judgment of a trial court from which there was no appeal. In this respect, *Taylor*, *Daniels* and *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970), are overruled. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

As to showing necessary for Supreme Court to grant writ of error coram nobis, see *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970), overruled on other grounds, *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971); *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on

other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

A writ of error coram nobis will not lie in the superior court after an appeal to the Supreme Court and an affirmation of the judgment in that court. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

B. Claims against State.

The Constitution no longer gives the Supreme Court original jurisdiction over claims against the State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court's jurisdiction over claims against the State is the same as its jurisdiction over all other claims. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Trial Court to Adjudicate Claims against State. — The appropriate trial court of the General Court of Justice now has original jurisdiction to adjudicate claims against the State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Issues of Fact. —

The Supreme Court's jurisdiction with respect to "issues" or "questions of fact" is exercised only in actions which are equitable in their nature, and in which relief is sought upon equitable principles. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Subsection (1) of this section, retaining the jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" as it had existed prior to the 1971 revision, has no relation to the court's prior original jurisdiction over claims against the State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Repeal and Unconstitutionality of § 7A-25. — Even if the General Assembly did not intend to repeal § 7A-25 by ratification of the 1971 revision of N.C. Const., Art. IV, § 7A-25 is unconstitutional. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Section 7A-25 was rendered null and void when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Sec. 13. *Forms of action; rules of procedure.*

The General Assembly has the final word on rules of practice and procedure in the trial courts of the State. *State v. Campbell*, 14 N.C. App. 596, 188 S.E.2d 558 (1972).

Governmental Immunity Not Abrogated. — A municipal corporation's governmental immunity against a claim for damages by a party wrongfully restrained or enjoined by the municipal corporation was not abrogated by the enactment of § 1A-1, Rule 65(c), providing that no security for payment of damages for wrongfully obtaining an injunction shall be required of the State or its political subdivisions, but that "damages may be awarded against such party in accord with this rule." *Orange County v. Heath*, 14 N.C. App. 44, 187 S.E.2d 345, aff'd, 282 N.C. 292, 192 S.E.2d 308 (1972).

Subsection (2) of this section would require a direct and positive declaration of policy, rather than a minute procedural change in § 1A-1, Rule 65 to abolish governmental immunity. *Orange County v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972).

The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. *Orange County v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972).

Sec. 14. *Waiver of jury trial.*

Trial judge's findings of fact found to be based upon a misapprehension of applicable law will be set aside on the theory that the evidence should be considered in its true legal light. *Security Ins. Group v. Parker*, 289 N.C. 391, 222 S.E.2d 437 (1976).

Applied in *Williams v. Williams*, 13 N.C. App. 468, 186 S.E.2d 210 (1972); *Hinson v. Hinson*, 17

Pretrial Discovery Does Not Infringe upon Rights. — Section 1A-1, Rule 26(b), authorizing the pretrial discovery of existence and contents of insurance, does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. *Marks v. Thompson*, 14 N.C. App. 272, 188 S.E.2d 22, aff'd, 282 N.C. 174, 192 S.E.2d 311 (1972).

Right to Request Jury Trial under § 50-10 Not Nullified. — Where the last pleading was filed nearly six months prior to the 1971 amendment of § 50-10, the amendment did not nullify the right to request a jury trial "prior to the call of the action for trial" conferred by § 50-10 at the time defendant filed the last pleading. *Branch v. Branch*, 282 N.C. 133, 191 S.E.2d 671 (1972).

Applied in *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

Quoted in *Simmons v. Textile Workers Union*, 15 N.C. App. 220, 189 S.E.2d 556 (1972).

Cited in *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

N.C. App. 505, 195 S.E.2d 98 (1973); *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975); *Whitaker v. Earnhardt*, 26 N.C. App. 736, 217 S.E.2d 125 (1975).

Quoted in *Branch v. Branch*, 282 N.C. 133, 191 S.E.2d 671 (1972).

Sec. 16. *Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.*

The one man, one vote rule does not apply to the State judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Appointment of Judges. — North Carolina could by her Constitution provide for the appointment of all State judges without violating any provision of the federal

Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State

be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district from which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial

system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for the election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Sec. 17. *Removal of Judges, Magistrates and Clerks.*

(1) *Removal of Judges by the General Assembly.* Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least 20 days before the day on which either house of the General Assembly shall act thereon. Removal from office by the General Assembly for any other cause shall be by impeachment.

(2) *Additional method of removal of Judges.* The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) *Removal of Magistrates.* The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity.

(4) *Removal of Clerks.* Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least 10 days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law. (1971, c. 560, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 substituted "Justice or Judge of the General Court of Justice" for "of the Supreme Court, Judge of the Court of Appeals, or Judge of the Superior Court" in the first sentence of subsection (1), inserted "by the General Assembly" in the third sentence of subsection (1), added present subsection (2) and redesignated former subsections (2) and (3) as (3) and (4) and deleted "District Judges and" preceding "Magistrates" in the catchline and in the text of present subsection (3).

Session Laws 1971, c. 560, s. 3, provides that the amendment shall be effective Jan. 1, 1973.

Article 30 of Chapter 7A Constitutional. — In view of the constitutional mandate in

subsection (2) of this section that the General Assembly shall prescribe a procedure for the censure and removal of judges in addition to impeachment and address as provided in subsection (1), respondent's contention that the General Assembly in enacting Article 30 of Chapter 7A abrogated its legislative duties by unconstitutionally delegating them to the Judicial Standards Commission, a creature of the General Assembly, is without merit. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article 30 of Chapter 7A is not unconstitutional because enacted in advance of the ratification of this section since the General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of an amendment authorizing it or provides that it

shall take effect upon the adoption of such an amendment. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Judicial Standards Commission Act, Chapter 7A, Article 30, of the General Statutes, is constitutional and, under that Article, the Supreme Court is vested with jurisdiction to act in a case involving the removal from office of a judge. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Nor Does Supreme Court Action Pursuant to Such Authority Violate Constitution. — By accepting and acting upon the original jurisdiction authorized by the people under subsection (2) of this section and conferred by the legislature, the Supreme Court does not usurp power constitutionally reserved to another branch of government. Thus, the exercise of such jurisdiction does not violate the constitutional doctrine of separation of powers. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Tests of Misconduct. — The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being prejudicial to the administration of justice and that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Whether a judge receives any personal benefit from his conduct is wholly irrelevant to an inquiry into the conduct of a judicial officer. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The disposition of cases for reasons other than an honest appraisal of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Codes of judicial conduct may usefully be consulted to give meaning to the constitutional standards. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Subsection (1) Provides Only for Removal from Office. — When a justice or judge is removed for incapacity, this subsection (1) imposes no sanction other than removal from office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Purpose of Subsection (2). — The purpose of subsection (2) of this section is not so much to

change the consequences of removal as it is to provide a "procedure in addition to impeachment and address" which will accomplish the goals which formerly could be accomplished only through the cumbersome and antiquated machinery of impeachment. It neither specifies a tribunal nor directs the creation of an authority for this purpose. It merely commands the legislature, in its discretion, to provide a new remedy as an adjunct to the cumbersome, ancient and impractical remedy of impeachment. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Subsection (2) of this section must be read in connection with the impeachment provisions of this article, which it was intended to supplement. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Provisions of Subsection (2) to Supplant Impeachment and Address. — Recognizing the need for a method of removal better than impeachment or address, the General Assembly, following the lead of many of the states, submitted subsection (2) as a constitutional amendment authorizing an additional method of removal of judges. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Supreme Court Granted Original Jurisdiction over Removal of Judges. — Ratification of the amendment adding subsection (2) carried with it an expression of the will of the people that the Constitution be amended so as to empower the legislature to confer upon the Supreme Court original jurisdiction over the censure and removal of judges. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

While subsection (2), which is a positive mandate to the legislature to provide a procedure in addition to impeachment for the removal and censure of judges and justices, does not expressly authorize the legislature to confer original jurisdiction upon the Supreme Court over the censure and removal of judges, by clear implication, it grants to the legislature authority to confer the jurisdiction upon the Supreme Court. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

"Mischief" to Be Cured. — The "mischief" to be cured by subsection (2) of this section was the inefficiency of removal proceedings under the impeachment and address provisions of the Constitution, not the remedies. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Disqualification Authorized. — Subsection (2) of this section authorizes the General Assembly to disqualify from holding further judicial office a justice or judge who has been removed for causes other than mental or physical disability. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Judge's execution judgments allowing limited driving privileges under § 20-179 upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of

important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *In re Crutchfield*, 289 N.C. 597, 223 S.E.2d 822 (1975).

Applied in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976).

Quoted in *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978).

Cited in *In re Stuhl*, 292 N.C. 379, 233 S.E.2d 562 (1977).

Sec. 18. *District Attorney and prosecutorial districts.*

(1) *District Attorneys.* The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe. (1973, c. 394, s. 3.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 5, 1974, substituted "prosecutorial" for "solicitorial" in the first sentence, and "District Attorney" for "Solicitor" in the first and second sentences of subsection (1).

Session Laws 1973, c. 394, s. 3, provides: "If a majority of the votes cast thereon are in favor of

the amendment set out in section 1 of this act, then the Governor shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of his office, and the amendment shall become effective on the first day of the next succeeding month."

As subsection (2) was not changed by the amendment, it is not set out.

Sec. 19. *Vacancies.*

Resignation Created Actual Vacancy. —

Where a district court judge resigned upon the discovery of his legal infirmity under § 7A-4.20(a), his resignation from office created an actual vacancy in that position. Hence, upon the resignation, there was no one legally entitled to hold office by virtue of an election, nor under

§ 128-7 was there an incumbent with the legal right to continue in office until a successor was elected or appointed. The judge, therefore, created a legal as well as an actual vacancy in office under N.C. Const., Art. IV, § 19. *People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978).

Sec. 21. *Fees, salaries, and emoluments.*

Proposed New § 22. — Session Laws 1979, c. 638, s. 1, proposes to add a new section to this Article to read as follows:

"Sec. 22. Qualification of Justices and Judges. Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court. This section shall not apply to persons elected to or serving in such capacities on or before January 1, 1981."

Session Laws 1979, c. 638, s. 2, provides that the amendment shall be submitted to the qualified voters of the State at the general election to be held in November 1980.

Session Laws 1979, c. 638, s. 3, provides for the form of ballot.

Session Laws 1979, c. 638, s. 4, provides: "If a majority of the votes cast are in favor of the amendment set out in Section 1 of this act, then the amendment shall be certified by the State Board of Elections to the Secretary of State, who shall enroll the amendment among the

permanent records of his office, and the amendment shall become effective on January 1, 1981."

ARTICLE V

FINANCE

Revision of Article. — This Article was rewritten by amendment proposed by Session Laws 1969, c. 1200, s. 1, and adopted by vote of

the people at the general election held Nov. 3, 1970. The amended article became effective July 1, 1973.

Section 1. *No capitation tax to be levied.* No poll or capitation tax shall be levied by the General Assembly or by any county, city or town, or other taxing unit. (1969, c. 1200, s. 1.)

Chapter 143, Article 7, Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp.

v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Sec. 2. *State and local taxation.*

(1) *Power of taxation.* The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

(2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

(3) *Exemptions.* Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes, and, to a value not exceeding \$300, any personal property. The General Assembly may exempt from taxation not exceeding \$1,000 in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.

(4) *Special tax areas.* Subject to the limitations imposed by Section 4, the General Assembly may enact general laws authorizing the governing body of any county, city, or town to define territorial areas and to levy taxes within those areas, in addition to those levied throughout the county, city, or town, in order to finance, provide, or maintain services, facilities, and functions in addition to or to a greater extent than those financed, provided, or maintained for the entire county, city, or town.

(5) *Purposes of property tax.* The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

(6) *Income tax.* The rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

(7) *Contracts*. The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only. (1969, c. 872, s. 1; c. 1200, s. 1.)

I. POWER OF TAXATION GENERALLY; CLASSIFICATION.

A. General Consideration.

Editor's Note. —

Pursuant to Session Laws 1969, c. 872, s. 7, and c. 1200, s. 7, subsection (6) of this section as rewritten by the amendment proposed by Session Laws 1969, c. 872, s. 1, has been substituted for subsection (6) as rewritten by the amendment proposed by Session Laws 1969, c. 1200, s. 1. Subsection (6) as it appeared in Session Laws 1969, c. 1200, s. 1, was erroneously carried in the 1973 Supplement.

Some of the cases cited in the following annotations were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

For an article entitled, "State Jurisdiction To Tax Tangible Personal Property," see 56 N.C.L. Rev. 807 (1978).

A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

A county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

A county board of elections does not have taxing power. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Subsection (1) is a limitation upon the legislative power, separate and apart from the limitation contained in the law of the land clause in N. C. Const., Art. I, § 19, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Taxes and Local Assessments for Public Improvements Distinguished. — There is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. *Southern Ry. v. City of Raleigh*, 9 N.C. App. 305, 176 S.E.2d 21 (1970), *aff'd*, 277 N.C. 709, 78 S.E.2d 422 (1971).

Police Power Compared to Legislative Authority to Expend Tax Money. — The power of the State to regulate privately owned institutions under its police power is more extensive than the authority of the legislature to expend tax money for the accomplishment of the same purpose. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Requirement of "Public Purpose". — The "public purpose" requirement acts as a limitation equally upon the power to tax and the power to appropriate and expend public funds. *Hughey v. Cloninger*, 37 N.C. App. 107, 245 S.E.2d 543 (1978).

Meaning of "Public Purpose". —

A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

For a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

The term "public purposes" is employed in the same sense in the law of taxation and in the law of eminent domain. Thus, if the General Assembly may authorize a State agency to expend public money for the purpose of aiding in the construction of a hospital facility to be leased to and ultimately conveyed to a private agency, it may also authorize the acquisition of a site for such facility by exercise of the power of eminent domain. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

When Direct Disbursement of Public Funds to Private Entity Permissible. — Under subsection (7) of this section direct disbursement of public funds to private entities is a constitutionally permissible means of accomplishing a public purpose provided there is statutory authority to make such appropriation. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

Legislative Declaration Not Conclusive. — A legislative declaration which asserts in general terms that the statute under consideration is enacted for a public purpose, although entitled to great weight, is not conclusive. When the facts are determined, what is a public purpose is a question of law for the court. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Supreme Court Determines Constitutionality of Appropriation. — It is the duty and prerogative of the Supreme Court to determine whether an appropriation of tax funds is for a purpose forbidden by the Constitution of the State when that question is properly raised. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Tax Revenues May Not Be Used, etc. —

In accord with original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

If an act creating a corporation is unconstitutional as violative of this section and Article I, § 19, of the Constitution of North Carolina, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is void because the purpose for which the corporation was created is not a public purpose, then taxpayer may maintain an action to restrain state officials from paying to the corporation and the corporation from using money appropriated out of the General Fund. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

This section does not prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation. In re Appeal of *Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974).

The principles of equality and uniformity are indispensable to taxation, whether general or local. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity, in its legal and proper sense, is inseparably incident to the exercise of the power of taxation. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Compliance with Rule of Uniformity, etc. —

The requirements of "uniformity," "equal protection," and "due process" are, for all practical purposes, the same under both the State and federal Constitutions. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

State May Not Levy Tax in Some Counties and Exempt Others. — The Constitution does not permit a state to levy a tax which discriminates in favor of or against taxpayers in the same classification. The prohibition extends throughout the State. Hence, the State cannot levy a tax in 25 counties and exempt 75 counties. Nor can the State set up a valid scheme by which that precise result is accomplished. Thus, the additional sales tax authorized by the Local Option Sales and Use Tax Act is unconstitutional. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Local taxation must be uniform upon the same class of subjects within the territorial

limits of the authority levying the tax. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Requirement of Uniformity Extends to License, Franchise and Other Forms of Taxation. — Repeated judicial interpretations extend the requirement of uniformity to license, franchise, and other forms of taxation. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Although it is not expressly provided that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the Constitution above cited, that it may be admitted that the collection of such a tax would be restricted as unconstitutional. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

When Tax Is Uniform. —

Taxing is required to be by a uniform rule — that is, by one and the same unvarying standard. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity is defined to consist in putting the same tax upon all of the same class — that is, while the same tax must be enforced upon all innkeepers, upon railroads, and so throughout, a tax discriminating persons of the same class, whereby some are required to pay more than others, would lack uniformity. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality under subsection (2) of this section. A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Under this section uniformity in taxation relates to equality in the burden of the State's taxpayers. In re Appeal of *Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974).

The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with

reference to composition, use or value. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

A tax within the meaning of the constitutional prohibition against a nonuniformity of taxation is a charge levied and collected as a contribution to the maintenance of the general government. It is imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

The rule of uniformity is observed, etc. —

With reference to locality a tax is uniform when it operates with equal force and effect in every place where the subject of it is found, and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity of taxation, as provided for by State Constitution, is required throughout the territorial limits of the taxing district. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Wide Latitude Accorded, etc. —

In accord with original. See Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Reasonableness of Classification. —

While the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Applied In re Appeal of Forsyth County, 285 N.C. 64, 203 S.E.2d 51 (1974); Master Hatcherries, Inc. v. Coble, 21 N.C. App. 256, 204 S.E.2d 395 (1974).

Stated in In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978).

B. Illustrative Cases.

Construction of Government Owned and Operated Hospital Is for Public Purpose. — It is well settled that the expenditure of tax funds for the construction of a hospital, to be owned and operated by the State, a county, a city, town or other political subdivision of the State, is an expenditure for a public purpose. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

But Construction of Privately Owned Hospital Is Not. — The expenditure of public funds raised by taxation to finance, or facilitate the financing of, the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose and is prohibited by this section. Foster

v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

The construction and operation of a privately owned hospital is not necessarily for a public purpose, within the meaning of the constitutional limitation upon the use of tax funds, and the circumstance that the privately owned hospital is not operated for profit is not determinative. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Local Option Sales and Use Tax Act. — The additional 1% sales and use tax authorized by the Local Option Sales and Use Tax Act was a State tax, not a county tax, and was unconstitutional since it was not uniformly applied to all taxpayers of the same class in all counties of the State. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

The levy imposed by the Local Option Sales and Use Tax Act was discriminatory in that it required one person to pay the tax involved and it exempted his competitor in a county which voted against the tax. Both Nash and Edgecombe were exempt if either voted against the tax. Uniformity is required. No provision was made for partial uniformity, and for that reason the tax authorized under former § 105-164.45 was unconstitutional. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Chapter 159A Violates Subsection (1). — The creation of county authorities for the purpose of financing pollution abatement and control facilities or industrial facilities for private industry by the issuance of tax-exempt revenue bonds is not for a public purpose and Chapter 159A, which purports to authorize such financing, violates subsection (1). Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

The interest of a county in collecting tax revenues under former § 105-281 was not within the zone of interest intended to be protected by this section; accordingly, that county could not contend that the provisions of former § 105-281 violated principles of uniformity. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Chapter 143, Article 7, Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Charges under § 143-117 Not Unequal. — The charges pursuant to § 143-117 are not made for the support of the government, nor are they related to or limited by the necessities of government. They represent the actual cost of the care, treatment and maintenance of a particular patient. It is not unequal or unjust taxation, nor taxation at all, to require a man to be supported out of his own estate. State ex rel.

Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

Household Property Tax. — Because there is some reasonable relationship between the value of a home and the value of the household property within, the percentage method is a reasonable one in accomplishing the object of determining the market value of household property, and thus there is no violation of subsection (2). In re Appeal of Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

Education Is a Public Purpose. — Both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose. *Hughey v. Cloninger*, 37 N.C. App. 107, 245 S.E.2d 543 (1978).

Character of Object of Appropriation Determinative. — Even where it is clear that the promotion of a school such as the Dyslexia School of North Carolina, Inc. and its program will be of advantage to the community and the public welfare, it is the character of the school as the object of the appropriations and expenditures which must determine their validity. *Hughey v. Cloninger*, 37 N.C. App. 107, 245 S.E.2d 543 (1978).

Private Entity Ordinarily May Not Receive Public Expenditure. — Even though the Dyslexia School of North Carolina, Inc. as a private nonprofit corporation is engaged in a clearly benevolent activity, which would not be constitutionally prohibited if provided through the public schools of Gaston County, it remains a private entity. As such it may not receive appropriations and expenditures from public funds of Gaston County as a constitutionally permissible means of achieving the desirable and commendable end of assisting in the education of the dyslexic children of Gaston County. *Hughey v. Cloninger*, 37 N.C. App. 107, 245 S.E.2d 543 (1978).

Direct assistance to private entities such as the Dyslexia School of North Carolina, Inc., distinguishable from direct disbursements to students for educational purposes, may not be the means used to effect a public purpose. *Hughey v. Cloninger*, 37 N.C. App. 107, 245 S.E.2d 543 (1978).

Annexation of Federal Air Force Base Constitutional. — The annexation of a federal Air Force base by the City of Goldsboro did not create unconstitutional tax classes. In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978).

II. EXEMPTIONS.

Statute Exempting Certain Property from Assessments for Local Improvements. — Former § 160-521, exempting railroad right-of-way property from assessment for local improvements, was not unconstitutional on the ground it was not authorized by this section, since this section deals with the power of taxation and not with assessments for local improvements. *Southern Ry. v. City of Raleigh*, 9 N.C. App. 305, 176 S.E.2d 21 (1970), aff'd, 277 N.C. 709, 178 S.E.2d 422 (1971).

Property of North Carolina Housing Finance Agency. — Since Chapter 122A and the North Carolina Housing Finance Agency's activities pursuant thereto are for a public purpose, it is permissible for the General Assembly to exempt from taxation the property of the Agency and the obligations incurred by the Agency to effectuate such public purpose. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Bonds of North Carolina Housing Authority. — Since the tax-exempt feature makes possible the more favorable sale of revenue bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued, the General Assembly may exempt them from taxation by the State or any of its subdivisions. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

The property owned by the Medical Care Commission, including hospital facilities leased to private nonprofit associations for operation, is property owned by the State within the meaning of this constitutional provision, making the exemption of such property from taxation mandatory. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 3. Limitations upon the increase of State debt.

(1) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to contract debts secured by a pledge of the faith and credit of the State, unless approved by a majority of the qualified voters of the State who vote thereon, except for the following purposes:

- (a) to fund or refund a valid existing debt;
- (b) to supply an unforeseen deficiency in the revenue;
- (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;

- (d) to suppress riots or insurrections, or to repel invasions;
- (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
- (f) for any other lawful purpose, to the extent of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium.

(2) *Gift or loan of credit regulated.* The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except a corporation in which the State has a controlling interest, unless the subject is submitted to a direct vote of the people of the State, and is approved by a majority of the qualified voters who vote thereon.

(3) *Definitions.* A debt is incurred within the meaning of this Section when the State borrows money. A pledge of the faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when the State exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(4) *Certain debts barred.* The General Assembly shall never assume or pay any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States. Neither shall the General Assembly assume or pay any debt or bond incurred or issued by authority of the Convention of 1868, the special session of the General Assembly of 1868, or the General Assembly of 1868-69 and 1869-70, unless the subject is submitted to the people of the State and is approved by a majority of all the qualified voters at a referendum held for that sole purpose.

(5) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

Editor's Note. —

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

The cases cited in the following annotation were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

The method of financing set forth in § 122A-6 does not create a debt within the meaning of the Constitution and therefore the limitations of this section are inapplicable. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Authority to Establish Reserve or Contingency Fund Not Pledge of Faith and Credit. — The fact that such appropriations as the General Assembly may see fit to make may be used for the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of a public corporation, does not constitute a pledge of the faith and credit of the State or of any political subdivision thereof for the payment of the principal of and the interest on any bonds or notes of the corporation. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

When Issuance of Bonds Does not Constitute Lending or Giving of State Credit.

— Where an act specifically provides that bonds or notes issued under it shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof, or a pledge of the faith and credit of the State or of any such political subdivision, but "shall be payable solely from the revenues and other funds provided therefor," the issuance of such bonds does not constitute a giving or lending of the credit of the State, or of its agency, within the meaning of this section. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Section 131-138 et seq. Does Not Violate Section. — Section 131-138 et seq., authorizing the Medical Care Commission (now Department of Human Resources) to issue revenue bonds to finance the construction of hospital facilities to be leased and ultimately conveyed to a public or private nonprofit agency, does not authorize the contracting of a debt by the State, or its agency, or lending of the faith and credit of the State, or its agency, in violation of this section. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 4. *Limitations upon the increase of local government debt.*

(1) *Regulation of borrowing and debt.* The General Assembly shall enact general laws relating to the borrowing of money secured by a pledge of the faith and credit and the contracting of other debts by counties, cities and towns, special districts, and other units, authorities, and agencies of local government.

(2) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:

- (a) to fund or refund a valid existing debt;
- (b) to supply an unforeseen deficiency in the revenue;
- (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
- (d) to suppress riots or insurrections;
- (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
- (f) for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year.

(3) *Gift or loan of credit regulated.* No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.

(4) *Certain debts barred.* No county, city or town, or other unit of local government shall assume or pay any debt or the interest thereon contracted directly or indirectly in aid or support of rebellion or insurrection against the United States.

(5) *Definitions.* A debt is incurred within the meaning of this Section when a county, city or town, special district, or other unit, authority, or agency of local government borrows money. A pledge of faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when a county, city or town, special district, or other unit, authority, or agency of local government exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(6) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

I. EDITOR'S NOTE.

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

The cases cited in the following annotation were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

II. PURPOSES; TWO-THIRDS LIMITATION.

This section contemplates a contracting of an obligation to be paid at some future time. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

It does not apply where the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

The acquisition of land from surplus funds is not beyond the power of a city and it in no way offends the provisions of this section. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

Provisions of Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act Held Unconstitutional. — Provisions of the Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act (§ 131-138 et seq.), which authorize local governmental units to enter into lease agreements with the Medical Care Commission (now Department of Human Resources) and which make obligations of any such governmental unit under

a lease agreement payable not only from revenues derived from the leased facility but also from revenues derived from other hospital facilities owned by the lessee and related to the leased facility, were held unconstitutional in that they authorize local government units to contract a debt without a vote of the people in excess of the amount specified in this section. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 5. Acts levying taxes to state objects. Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose. (1969, c. 1200, s. 1.)

Editor's Note. —

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

The cases cited in the following annotation were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

A law authorizing a bond issue for various purposes which does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose is not void. Such matter may properly rest within the sound discretion of the municipal authorities. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Transfer of Funds from One Project to Another. — While a municipality has a limited authority, under certain conditions, to transfer or allocate funds from one project to another, included within the general purpose for which bonds are authorized, the transfer must be to a project included in the general purpose as stated in the bond resolution, and the funds may be diverted to the proposed purposes only in the event the municipality finds in good faith that conditions have so changed since the bonds were authorized that proceeds therefrom are no longer needed for the original purpose. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Courts Will Not Interfere with Exercise of Discretionary Powers of Municipal Corporation. — With respect to the use of bond

money, the court will not interfere with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Immaterial or Temporary Changes Not Unlawful Diversions of Funds. — While the law will not justify the use of the proceeds of a State or municipal bond issue for purposes other than those specified in the act authorizing the issue, it does not follow that immaterial or temporary changes consistent with the general purpose of the legislative act should be interpreted as unlawful diversions of public funds. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Changes Necessary to Accomplish General Purpose Are Not Outlawed. — It is worthy of note the cases on the use of bond money emphasize "deviation from the general purpose for which bonds are authorized" and do not outlaw such changes as are necessary under existing conditions to accomplish the general purpose. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

A definition of corporate purpose cannot be static. Changing conditions require that application of the limitations be tempered with due recognition of the existing situation so the purpose for which the public body was organized may be accomplished and enjoyment thereof by the public made possible. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Sec. 6. Inviolability of sinking funds and retirement funds.

(1) *Sinking funds.* The General Assembly shall not use or authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which the sinking fund has been created, except that these funds may be invested as authorized by law.

(2) *Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local

Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee. (1969, c. 1200, s. 1.)

Editor's Note. —

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

Sec. 7. Drawing public money.

(1) *State treasury.* No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

(2) *Local treasury.* No money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law. (1969, c. 1200, s. 1.)

Editor's Note. — An amendment proposed by Session Laws 1973, c. 1222, and defeated at the general election held Nov. 5, 1974, would have added to this article a new § 8, relating to bond issues to finance capital projects for industry.

An order to make retroactive payments under the federal aid to dependent families

program looks directly to the payment of public funds out of the State treasury in violation of this section. *Dawkins v. Craig*, 483 F.2d 1191 (4th Cir. 1973), cert. denied, 415 U.S. 938, 94 S. Ct. 1454, 39 L.Ed.2d 495 (1974).

Sec. 8. Health care facilities.

Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State, counties, cities or towns, and other State and local governmental entities to issue revenue bonds to finance or refinance for any such governmental entity or any nonprofit private corporation, regardless of any church or religious relationship, the cost of acquiring, constructing, and financing health care facility projects to be operated to serve and benefit the public; provided, no cost incurred earlier than two years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from the revenues, gross or net, of any such projects and any other health care facilities of any such governmental entity or nonprofit private corporation pledged therefor; shall not be secured by a pledge of the full faith and credit, or deemed to create an indebtedness requiring voter approval of any governmental entity; and may be secured by an agreement which may provide for the conveyance of title of, with or without consideration, any such project or facilities to the governmental entity or nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto for nonprofit private corporations. (1975, c. 641, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

Session Laws 1975, c. 641, s. 4, provides:

"Sec. 4. This act shall be deemed to provide

an alternative method for the doing of the things authorized hereby, shall be regarded as supplemental and additional to powers conferred by other laws and shall not be regarded as in

derogation of any powers now existing, and this act shall not be construed as a limitation or restriction on the power of the General Assembly to enact laws authorizing governmental entities to issue revenue bonds for health care purposes."

Sec. 9. *Capital projects for industry.*

Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to authorize counties to create authorities to issue revenue bonds to finance, but not to refinance, the cost of capital projects consisting of industrial, manufacturing and pollution control facilities for industry and pollution control facilities for public utilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property for any such capital project. (1975, c. 826, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

Sec. 10. *Joint ownership of generation and transmission facilities.* In addition to other powers conferred upon them by law, municipalities owning or operating facilities for the generation, transmission or distribution of electric power and energy and joint agencies formed by such municipalities for the purpose of owning or operating facilities for the generation and transmission of electric power and energy (each, respectively, "a unit of municipal government") may jointly or severally own, operate and maintain works, plants and facilities, within or without the State, for the generation and transmission of electric power and energy, or both, with any person, firm, association or corporation, public or private, engaged in the generation, transmission or distribution of electric power and energy for resale (each, respectively, "a co-owner") within this State or any state contiguous to this State, and may enter into and carry out agreements with respect to such jointly owned facilities. For the purpose of financing its share of the cost of any such jointly owned electric generation or transmission facilities, a unit of municipal government may issue its revenue bonds in the manner prescribed by the General Assembly, payable as to both principal and interest solely from and secured by a lien and charge on all or any part of the revenue derived, or to be derived, by such unit of municipal government from the ownership and operation of its electric facilities; provided, however, that no unit of municipal government shall be liable, either jointly or severally, for any acts, omissions or obligations of any co-owner, nor shall any money or property of any unit of municipal government be credited or otherwise applied to the account of any co-owner or be charged with any debt, lien or mortgage as a result of any debt or obligation of any co-owner. (1977, c. 528, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the general election held Nov. 8, 1977.

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Section 1. *Who may vote.* Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (1971, c. 201, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 substituted "18" for "21."

Session Laws 1971, c. 201, s. 4, as amended by Session Laws 1971, c. 1141, s. 1, provides that the amendment shall be effective Jan. 1, 1973.

Sec. 2. *Qualifications of voter.***Editor's Note. —**

For comment entitled, "State Durational Residence Requirements as a Violation of the Equal Protection Clause," see 3 N.C. Cent. L.J. 233 (1972).

For survey of 1972 case law on student suffrage, see 51 N.C.L. Rev. 1060 (1973).

"Residence" Defined. —

Residence within the purview of this provision is synonymous with domicile, and as used in the North Carolina Constitution of 1970 continues to mean domicile. *Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).

One-Year Residency Requirement Invalid As Applied to Local Elections. — The one-year durational residency requirement as it relates to the right to vote in local elections, is unconstitutional and invalid, as violative of the equal protection clause of the Fourteenth Amendment. *Andrews v. Cody*, 327 F. Supp. 793 (M.D.N.C. 1971), *aff'd*, 405 U.S. 1034, 92 S. Ct. 1306, 31 L.Ed.2d 576 (1972).

Sec. 6. *Eligibility to elective office.* Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office. (1971, c. 201, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 inserted "who is 21 years of age."

Session Laws 1971, c. 201, s. 4, as amended by Session Laws 1971, c. 1141, s. 1, provides that

Eighteen-year olds are now sui juris and, if they possess the qualifications prescribed by law for all voters, are eligible to vote. *Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).

Denial of Right to Vote to Convicted Felon Is Not Cruel and Unusual Punishment. — Plaintiff's argument that denial of right to vote for being a convicted felon is cruel and unusual punishment is without merit, especially considering the large number of states that do so. *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961, 93 S. Ct. 2151, 36 L.Ed.2d 681 (1973).

United States Const., Amend. XIV, § 2, Expressly Allows Exclusion of Felons. — A state may constitutionally continue the "historic exclusion" of felons from the franchise without regard to whether such exclusion can pass muster under the equal protection clause, because U.S. Const., amend. XIV, § 2, expressly allows the exclusion of felons from the franchise without reduction of representation. *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961, 93 S. Ct. 2151, 36 L.Ed.2d 681 (1973).

the amendment shall be effective Jan. 1, 1973.

Qualifications Are for "Elective Office"; a Sheriff's Deputy Need Not Reside in the County in Which He Serves. — See opinion of Attorney General to Sheriff John H. Stockard, 41 N.C.A.G. 754 (1972).

Sec. 8. *Disqualifications for office.***Requirement That Applicant for Office Admits Existence of God Violates First Amendment of United States Constitution.** —

See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, 41 N.C.A.G. 727 (1972).

"Adjudged" Defined. — The word "adjudged" means "to decide or rule upon as a judge or with judicial or quasi-judicial powers." In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

"Guilty" Defined. — The word "guilty" connotes evil, intentional wrongdoing and refers to conscious and culpable acts; it does not necessarily mean or require criminal conviction or the finding of a jury. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

The definitions of "adjudged" and "guilty" are broad enough to encompass an adjudication by the Supreme Court, pursuant to the provisions of § 7A-376, that a judge is guilty of willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Criminal Conviction Unnecessary for Disqualification. — The substitution in this section of the term "adjudged guilty" for the term "convicted" permits the General Assembly

to prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office. Pursuant to that authorization, the legislature enacted § 7A-376 barring a judge from future judicial office when he has been removed by this court for willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Adjudication of "Willful Misconduct in Office" Equivalent of "Malpractice in Any Office" for Removal Purposes. — An adjudication of "willful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence," is equivalent to an adjudication of guilt of "malpractice in any office" as used in this section. Therefore, the legislature acted within its power when it made disqualification from judicial office a consequence of removal for willful misconduct under § 7A-376. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Cited in Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974).

Sec. 9. *Dual office holding.*

Cited in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

ARTICLE VII

LOCAL GOVERNMENT

Section 1. General Assembly to provide for local government. The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

The General Assembly shall not incorporate as a city or town, nor shall it authorize to be incorporated as a city or town, any territory lying within one mile of the corporate limits of any other city or town having a population of 5,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within three miles of the corporate limits of any other city or town having a population of 10,000 or more according to the most recent decennial census of population taken by order of Congress; or lying within four miles of the corporate limits of any other city or town having a population of 25,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within five miles of the corporate limits of any other city or town having a population of 50,000 or more according to the most recent decennial census of population taken by order of Congress.

Notwithstanding the foregoing limitations, the General Assembly may incorporate a city or town by an act adopted by vote of three-fifths of all the members of each house. (1971, c. 857, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 7, 1972, added the second paragraph.

Session Laws 1971, c. 857, s. 4, provides that the amendment shall be effective Jan. 1, 1973.

The fixing of boundaries of municipal corporations is a permissible legislative function. *Jones v. Jeanette*, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

Court Inquiry into Motives of Legislature.

— Ordinarily, the courts have no authority to inquire into the motives of the legislature in the incorporation of political subdivisions. *Jones v. Jeanette*, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory. Its charter is the legislative description of the power to be exercised. In *re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

Counties, cities and towns, etc. —

The counties of North Carolina were created by the General Assembly as governmental agencies of the State. In *re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974).

A county derives its power to tax from the legislature and cannot complain that the enabling legislation is lacking in breadth. In *re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974).

The power of taxation must be exercised by the legislative branch. In *re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974).

The charter of a municipal corporation, city or town, is the legislative description of the

power to be exercised. In *re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

Powers of Municipal Corporation. — A municipal corporation possesses, and can exercise, the following powers, and no others: (1) those granted in express words; (2) those necessarily or fairly implied; and (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. In *re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

Doubt as to Power Resolved against Corporation. — Any fair, reasonable doubt concerning the existence of power is resolved by the courts against a municipal corporation, and the power is denied. In *re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

County Has No Inherent Power to Levy Taxes. — A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. The county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

The counties have no inherent taxing power. In *re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974).

A county board of elections does not have taxing power. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Cited in State v. Jones, 41 N.C. App. 189, 25 234 (1979).

ARTICLE VIII CORPORATIONS

Section 1. *Corporate charters.*

Quoted in *Sides v. Cabarrus Mem. Hosp.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974).

ARTICLE IX EDUCATION

Section 1. *Education encouraged.*

Quoted in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F. Supp. 786 (W.D.N.C. 1970);

Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

Sec. 2. *Uniform system of schools.*

In General. —

The provisions of this section and N.C. Const., Art. I, § 15 with the activating statutes, including § 115-1, embody mandates for the establishment of free public schools in North Carolina, the untrammelled privilege of education for all students, and "the duty of the State to maintain and guard that right," while guaranteeing equal opportunities to all students. *Webster v. Perry*, 512 F.2d 612 (4th Cir. 1975).

The General Assembly has not delegated to boards of county commissioners the power to initiate and fund their own programs for the public schools; rather, county commissioners are delegated the power to fund only those school-related programs proposed by the board of education. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

Sec. 3. *School attendance.*

Right to Education. — The Constitution of North Carolina treats education as the right of every child of "sufficient physical and mental

Sec. 4. *State Board of Education.*

Editor's Note. —

For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

Sec. 5. *Powers and duties of Board.*

Constitution of 1868 Authorized Rules on Certification of Teachers. — Article IX, § 9, Const. 1868, was designed to make, and did make, the powers conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly. That Constitution, itself, conferred upon the State Board of Education the enumerated powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. In the silence of the General Assembly, the authority of the State Board to promulgate and administer further regulations concerning the certification of teachers in the public schools was limited only by other provisions in the

Charlotte-Mecklenburg Schools Ordered to Desegregate. — See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F. Supp. 786 (W.D.N.C. 1970).

Students Expelled under § 115-147 Entitled to Reinstatement or Equivalent. — Under the North Carolina Constitution and the implementing statute, students expelled from school pursuant to the authority of § 115-147 may be entitled to either reinstatement or to equivalent free educational opportunities in a more suitable environment. *Webster v. Perry*, 367 F. Supp. 666 (M.D.N.C. 1973), modified on other grounds, 512 F.2d 612 (4th Cir. 1975).

Quoted in *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972); *Wilson County Bd. of Educ. v. Wilson County Bd. of Comm'rs*, 26 N.C. App. 114, 215 S.E.2d 412 (1975).

ability." *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972).

Stated in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971).

Constitution itself. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

And Present Constitution Contains Similar Authorization. — Rules and regulations relating to the certification of teachers being needed for the effective supervision and administration of the public school system, there is no difference in substance between the powers of the State Board of Education authorizing regulations on this matter under Art. IX, § 9, Const. 1868, and this section. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Quoted in *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972).

Sec. 7. *County school fund.*

This section was designed in its entirety, etc.

In accord with original. See *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976).

Where fines and penalties are prescribed as a punishment for a violation of public wrongs, i.e., crimes, and such penalties or fines are to be recovered by public authority, the disposition of such recovered fines or penalties comes within the constitutional provision under consideration, and they may not be turned away from the prescribed constitutional course. *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976).

Any statute purporting to give what are in reality fines either to an individual or to another governmental agency violates this constitutional provision. *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976).

Judgment by a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional. *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976).

Moneys to be set aside for future enforcement of the law cannot be deducted from "fines" to arrive at "clear proceeds" of fines. *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976).

Provision in separation agreement that plaintiff pay educational expenses for children is not violative of this section nor of the Fourteenth Amendment to the United States Constitution where such expenses are incurred in attendance at private school. *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E.2d 911, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (1975).

Applied in *State v. Walker*, 27 N.C. App. 295, 219 S.E.2d 76 (1975).

Stated in *Wilson County Bd. of Educ. v. Wilson County Bd. of Comm'rs*, 26 N.C. App. 114, 215 S.E.2d 412 (1975).

Cited in *Roberson v. Dale*, 464 F. Supp. 680 (M.D.N.C. 1979).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

Section 1. *Personal property exemptions.*

Law Protects Owner Only from Loss of Exempt Property under Final Process.—The law protects the owner not from destitution but only from loss of exempt property due to sale under final process for the collection of any debt. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Debtor May Voluntarily Bargain away Right.—In the cases of foreclosure of mortgages or of taking possession of collateral after default, no right to possession of property otherwise exempt remains in the debtor who has voluntarily bargained it away. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

The exemption provisions in the Constitution do not make special allowances for a resident's sole remaining assets. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Legislature Has Not Prevented Debtor from Transferring Interest in Property to Another.—The legislature has seen fit to surround the family home with certain protection against the demands of urgent creditors to put it beyond the

reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. It has not seen fit to prevent a debtor from "selling" or otherwise transferring an interest in that property to another, thereby giving the other priority of right to possession of the collateral. The constitutional exemption operates against general creditors so as to allow the debtor to retain his most valued \$500.00 of property in the face of their executions. It does not operate so as to hinder secured creditors from realizing on the terms of their bargain. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Security Interest Replaced Chattel Mortgage as Protection of Creditor.—Before the enactment of the Uniform Commercial Code, a debtor could subject his personal property to a chattel mortgage, and if he did so, the property was liable for the mortgage debt first and the debtor's exemption was allotted only in the amount of the surplus. An Article 9 security interest by the terms of the Uniform Commercial Code replaces the chattel mortgage as a method of protecting the creditor. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Debtor divested herself of her right to possession of personal property which might otherwise have been exempt by the terms of her consumer loan contract with her creditor whereby the creditor obtained a security interest in all of her personal property, including her household furnishings. When the debtor defaulted, the creditor had an immediate right to possess all articles in which she had given a

security interest. However, this right must be distinguished from any interest which a creditor might seek under an executory waiver of the right to exemption. It has long been held that a debtor cannot be bound by any agreement to waive his exemption in case of levy upon his property. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Sec. 2. *Homestead exemptions.*

(3) *Exemption for benefit of surviving spouse.* If the owner of a homestead dies, leaving a surviving spouse but no minor children, the homestead shall be exempt from the debts of the owner, and the rents and profits thereof shall inure to the benefit of the surviving spouse until he or she remarries, unless the surviving spouse is the owner of a separate homestead.

(4) *Conveyance of homestead.* Nothing contained in this Article shall operate to prevent the owner of a homestead from disposing of it by deed, but no deed made by a married owner of a homestead shall be valid without the signature and acknowledgement of his or her spouse. (1977, c. 80, ss. 1, 2.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 8, 1977, rewrote subsections (3) and (4) so as to make them applicable to a surviving spouse rather than to a widow only. The amendment also inserted "minor" preceding "children" in subsection (3).

As subsections (1) and (2) were not changed by the amendment, they are not set out.

Comparison of former section with the present subsection (1) reveals that the major difference is that under the former the homestead could not exceed \$1000 in value, while under the present Constitution the homestead shall be to a value fixed by the General Assembly but not less than \$1000. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Power to Increase Value of Homestead Exemption. — The Constitution expressly vests in the General Assembly, not in the courts, the exclusive power to increase the value of the homestead exemption. *Seeman Printery, Inc. v.*

Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Exemption of Dwelling House Regardless of Value. — The constitutional and statutory enactments relating to the homestead exemption cannot be so construed as to permit exemption of an entire usable dwelling house, regardless of its value. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Where Allotment Useless to Debtor and Impairs Value of Remaining Property. — Where the debtor requested that the allotment of his homestead begin at a point at the front door of his dwelling, with the result that the entire area allotted was located in the hallway adjacent to the front door of the house, the fact that the allotment was useless to the debtor and impaired the value of the remaining property available for satisfaction of the creditor's judgment did not entitle the debtor to claim his exemption in the entire dwelling. *Seeman Printery, Inc. v. Schinhan*, 34 N.C. App. 637, 239 S.E.2d 744 (1977).

Sec. 3. *Mechanics' and laborers' liens.*

Quoted in *Wilbur Smith & Assocs. v. South Mt. Properties, Inc.*, 29 N.C. App. 447, 224 S.E.2d 692 (1976).

Cited in *Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church*, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Sec. 4. *Property of married women secured to them.*

Editor's Note. —

For comment on the constitutionality of the privy examination under § 52-6(a) (now repealed) and its relation to this section, see 12 *Wake Forest L. Rev.* 1007 (1977).

Cited in *Spencer v. Spencer*, 37 N.C. App. 481, 246 S.E.2d 805 (1978).

Sec. 5. *Insurance.* A person may insure his or her own life for the sole use and benefit of his or her spouse or children or both, and upon his or her death the proceeds from the insurance shall be paid to or for the benefit of the spouse or children or both, or to a guardian, free from all claims of the representatives or creditors of the insured or his or her estate. Any insurance policy which insures the life of a person for the sole use and benefit of that person's spouse or children or both shall not be subject to the claims of creditors of the insured during his or her lifetime, whether or not the policy reserves to the insured during his or her lifetime any or all rights provided for by the policy and whether or not the policy proceeds are payable to the estate of the insured in the event the beneficiary or beneficiaries predecease the insured. (1977, c. 115, s. 1.)

Editor's Note. —
The amendment adopted by vote of the people at the general election held Nov. 8, 1977, rewrote this section so as to make it applicable to

insurance upon the life of a person of either sex, rather than of a husband only.
Applied in First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

ARTICLE XI
PUNISHMENTS, CORRECTIONS, AND CHARITIES

Section 1. *Punishments.*

Limits Remedial Creativity. — This provision, in effect since 1868, was intended to stop the use of degrading punishments theretofore inflicted, but as a necessary consequence it also limited the creativity of trial judges in fashioning remedies for crime. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

As a consequence of the desire for more diverse responses to criminal behavior, the practice developed to suspend a constitutionally designated punishment with the consent of the defendant upon his performance of conditions. And so long as these conditions are otherwise constitutional, related to the purposes of punishment, and otherwise reasonable they need not be limited to the type of punishment prescribed by this provision. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

Right and Duty of Prosecuting Attorney to Seek Death Penalty. — The grand jury, an

agency of the State, after investigation according to law, indicted the defendant for murder in the first degree, and the solicitor, an officer of the State, after investigation, determined, on behalf of the State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously, but fairly and in accordance with law, both in the presentation of evidence and in his argument, to seek that result. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L.Ed.2d 761 (1972).

Cited in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Sec. 2. *Death punishment.*

Applied in State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976).

Cited in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Sec. 4. *Welfare policy; board of public welfare.*

Quoted in Vaughn v. Durham County Dep't of Social Servs., 34 N.C. App. 416, 240 S.E.2d 456 (1977).

ARTICLE XIV

MISCELLANEOUS

Sec. 3. *General laws defined.* Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act. (1969, c. 1200, s. 1.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 3, 1970, effective July 1, 1973, inserted "or general laws uniformly applicable throughout the State" in the first sentence, substituted "such" for "that" preceding "subject matter" near the end of the first sentence, added the third sentence and deleted "county, city and town, and other" preceding "unit of local government" near the end of the fourth sentence.

The constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

What Is a General Law. — A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

A law is general if any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

What Is a Local Act. — A local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply

uniformly to all members of the designated class. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Distinguishing between General and Local Acts. — The distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

The mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation and condition. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Regulation Need Not Reach Every Conceivable Class. — There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied — that the legislature must be held rigidly to the choice of regulating all or none. It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

While substantial distinctions are essential in classification, the distinctions need not be scientific or exact. The legislature has wide discretion in making classifications. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Coastal Area Management Act Valid.— The Coastal Area Management Act of 1974 is a general law which the General Assembly had power to enact. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Sec. 5. *Conservation of natural resources.* It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

To accomplish the aforementioned public purposes, the State and its counties, cities and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by resolution adopted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, constitute part of the "State Nature and Historic Preserve," and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes. (1971, c. 630, s. 1.)

Editor's Note. — This section was added by the constitutional amendment adopted by vote of the people at the general election held Nov. 7, 1972.

Session Laws 1971, c. 630, s. 4, provides that the section shall be effective July 1, 1973.

Constitution of the United States

AMENDMENTS

AMENDMENT XXVI.

§ 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-sixth Amendment was certified by the Administrator of General Services on July 5, 1971, to have been ratified by three fourths of

the whole number of states and to have become valid as a part of the Constitution of the United States.

(2) SUPPLEMENTARY RULES

GOVERNING THE HEARING OF CASES IN THE SUPREME COURT
WHICH WERE ORIGINALLY DOCKETED IN THE COURT OF
APPEALS AND OTHER RULES REQUIRED BY THE ACT
ESTABLISHING THE COURT OF APPEALS.

(Superseded as of July 1, 1975.)

Editor's Note. -- These rules are superseded by the North Carolina Rules of Appellate Procedure, adopted by the Supreme Court June

15, 1975, and effective with respect to appeals in which notice of appeal was given on or after July 1, 1975. See Appendix 1 (2A).

(2A) NORTH CAROLINA RULES OF APPELLATE PROCEDURE

(Adopted June 15, 1975.)

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2), of the Constitution of North Carolina. They shall be effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission, and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N. C. 763 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N. C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N. C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

The Drafting Committee Notes and an Appendix of Tables and Forms prepared by the Committee are published with the rules for their possible

Appendix I. Rules of Practice in the General Court of Justice

(1) RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA

(Superseded as of July 1, 1975.)

Editor's Note. — These rules are superseded by the North Carolina Rules of Appellate Procedure, adopted by the Supreme Court June

13, 1975, and effective with respect to appeals in which notice of appeal was given on or after July 1, 1975. See Appendix I (2A).

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The Drafting Committee Notes and an Appendix of Tables and Forms prepared by the Committee are published with the rules for their possible

helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, they are not authoritative sources on parity with the rules.

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ARTICLE I. APPLICABILITY OF RULES

Rule 1

Scope of Rules: Trial Tribunal Defined

(a) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies to the Court of Appeals; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) **Definition of Trial Tribunal.** As used in these rules, the term *trial tribunal* includes the superior courts, the district courts, the North Carolina Utilities Commission, the North Carolina Industrial Commission, and the Commissioner of Insurance.

Drafting Committee Note

Sources of parallels in former rules or statutes: None.

Commentary.

Subdivision (a) charts the coverage of this unitary set of Rules of Appellate Procedure as promulgated by the Supreme Court effective July 1, 1975. This coverage includes all appeals to and review by the Court of Appeals and the Supreme Court. It does *not* include certain other "appeals" within the General Court of Justice: i.e. appeals from clerk of superior court to judge of superior court under G.S. §§ 1-272 et seq.; from quasi-judicial bodies to superior court, as under G.S. §§ 143-306 et seq.; and from

magistrate to district court for trial de novo under G.S. §§ 7A-228 et seq.

Subdivision (b) expresses a fundamental limitation on the scope of the rule-making power of the Supreme Court under which these Rules are promulgated. The essential rule-making power is grounded in the Constitution which, in Art. IV, § 13(2), confers upon the Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." The same section forbids exercise of that power in a way which would "abridge substantive rights or abrogate or limit the right of trial by jury." This Rule further disclaims any

power or intention by the Court that the Rules be interpreted in any way to alter the jurisdiction of the courts of the appellate division as prescribed by Constitution and statute. This simply expresses a further restriction on the rule-making power which, though not explicit in

the Constitution as is the limitation above noted, is certainly implicit in the general "separation of powers" provision, Art. I, § 6.

Subdivision (c) is self-explanatory.

Mandatory. — The North Carolina Rules of Appellate Procedure are mandatory, and for violation of the rules an appeal is subject to dismissal. *State v. Gillespie*, 31 N.C. App. 520, 230 S.E.2d 154 (1976).

The North Carolina Rules of Appellate Procedure are mandatory. *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E.2d 836 (1976); *State v. Motsinger*, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); *In re Allen*, 31 N.C. App. 597,

230 S.E.2d 423 (1976); *State v. Lesley*, 33 N.C. App. 237, 234 S.E.2d 476 (1977); *White v. Lawrence*, 33 N.C. App. 631, 236 S.E.2d 30 (1977).

Quoted in *Byrd v. Alexander*, 32 N.C. App. 782, 233 S.E.2d 654 (1977); *State v. Johnson*, 38 N.C. App. 111, 247 S.E.2d 286 (1978).

Cited in *Indian Trace Co. v. Sanders*, 33 N.C. App. 386, 235 S.E.2d 91 (1977); *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Rule 2

Suspension of Rules

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary. This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules. The power does not of course depend upon its express reservation by the Court in the body of the Rules. It is included here as a reminder to counsel that the power does exist, and that it may be drawn upon by

either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court. The phrase "except as otherwise expressly provided" refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules (i.e. Rules 14 and 15) or in "jurisdictional" statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by any court.

Applied in *Triplett v. Triplett*, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

Cited in *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976); *City of Hickory*

v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); *Smith v. Pacific Intermountain Express Co.*, 39 N.C. App. 249, S.E.2d (1978).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3

Appeal in Civil Cases — How and When Taken

(a) **From Judgments and Orders Rendered in Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by

(1) giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) **From Judgments and Orders Rendered Out of Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(c) **Time When Taken by Written Notice.** If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under Rule 59 to alter or amend a judgment; (iv) a motion under Rule 59 for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivisions (a)(2) and (b) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

Drafting Committee Note

Sources or parallels in former rules or statutes. Subdivisions (a), (b), (c): G.S. §§ 1-279, 1-280. Subdivisions (d) and (e): None.

Commentary.

Subdivision (a) carries forward the traditional code practice which has permitted appeal to be taken from judgments rendered

during a session of court by either of two means: 1) oral notice given "at trial," or 2) written notice filed and served within a specified period (10 days from "entry" per subdivision (c)). The opportunity to give oral notice is extended by the Rule to other settings than the traditional "at trial" and "during a session," to include

additionally the setting described as "at a hearing" on any of the typical post-verdict motions under Rules 50 and 59 of the Rules of Civil Procedure. The phrases "during a session" and "at trial" are carried forward from the old code statutory sections to describe the traditional setting for oral notice. Although questions could always have existed as to when "trial" begins and ends, bench and bar have always equated "at trial" with "in open court" and there simply has not been this difficulty. See, e.g., *Mason v. Commrs. of Moore County*, 229 N.C. 626, at 627, 628 (1948). The underlying notion behind charging all parties with notice of appeal given orally "at trial" is undoubtedly the same as that which dictates that oral motions suffice to charge all persons with notice when made during the course of trial, a principle long recognized in our pre-1970 code practice, *Collins v. N. C. State Hwy. & P. W. Comm.*, 237 N.C. 277 (1953), and now expressly embodied in N.C.R.Civ.P. 7(b)(1). It is in keeping with this principle that the Rule now extends the opportunity for giving oral notice of appeal to these specific, frequently used post-verdict motion hearings. Here too it seems fair to charge with notice, since parties must have been given notice of the hearings themselves. N.C.R.Civ.P. 7(b)(1), 5(a). In any event, an appellant may always elect in either setting to give written notice (within the prescribed period) rather than oral notice. And if, as will frequently be the case, the hearing is adjourned without ruling, the appellant will perforce have to use written notice when the order is later entered.

This Rule does not speak to the related matter of providing a record entry of the fact that appeal has been duly taken by either mode. The code provision, former G.S. § 1-280, cryptically required that, however appeal was taken, the appellant should "cause his appeal to be entered by the clerk on the judgment docket." This requirement of formal entry "on the judgment docket" was early held not mandatory, just so long as the record showed in some adequate way that appeal was duly taken by either mode. *Atkinson v. Asheville St. Ry.*, 113 N.C. 581 (1893). The traditional way of insuring this record entry — particularly appropriate for the oral notice — came to be by using practically standardized "appeal entries" which, along with recitations concerning security and time-tables for perfecting appeal, contain a notation that appeal has duly been taken. These Rules carry forward the developed requirement of such record entry. See Rule 9(b)(ix). This latter provision clearly authorizes continued use of the customary "appeal entries" to record the taking of appeal by oral notice. In the case of appeal by filing written notice, a copy of the written notice, with filing date per Rule 9(c)(3), will clearly suffice as the record entry of the fact that appeal

has been duly taken. See Committee Form 5 "Appeal Entries," with explanatory Note.

Subsection (2) of subdivision (a) requires that service of copies of a written notice of appeal be made by the appellant upon all *other* parties, not just *adverse* parties as under the formerly controlling code provision, now repealed G.S. § 1-280. The primary reason for extending the requirement of notice to other than adverse parties is to tie into the provision of subdivision (c) which tolls the time for taking appeal as to all other parties when any party takes a timely appeal. Another reason is that it may sometimes be difficult to determine just who is such an "adverse" party. Co-parties may in some situations be "adverse." *Rose v. Baker*, 99 N.C. 323 (1888) (interest of co-defendant not given notice of appeal may not be adversely affected upon appellate review). This rule avoids any necessity for making such a determination. Rule 26, which is cross-referred in subdivision (c) of this Rule for the manner of making service, provides such simple and ready means that the requirement of all-party service seems not burdensome.

Subdivision (b) carries forward the traditional practice by which appeals from judgments not rendered in session (hence not subject to appeal by oral notice "at trial") may of course be taken by filing and serving written notice of appeal within the time provided in subdivision (c).

Subdivision (c) provides the timetable for taking appeal by written notice. It thus is in play in all situations where appeal is not taken by oral notice. The basic time limit is the traditional 10 days of code practice. But this time commences to run from a different point than did the period under former statutes (as judicially interpreted). Under former law, the time was stated to run from the date of "rendition" of a judgment in session, and from the date of "notice" of a judgment rendered out of session. G.S. § 1-279. By judicial interpretation these points in time had been fixed, respectively, as the last day of the session and as the date when the judgment was filed in the clerk's office. 2 McIntosh, *North Carolina Practice and Procedure in Civil Cases*, § 1783(1) 2d ed. (1956). Under this Rule 3 the time begins to run with respect to *any* civil judgment, whether rendered in or out of session, from the date of its "entry." "Entry" is a word of art with a precise meaning now dictated by Rule 58 of the Rules of Civil Procedure. However satisfactory the procedure under Civil Rule 58 generally, its clear specification of the act which accomplishes "entry" of a judgment of any kind, coupled with its requirement that this be made a matter of record, provides counsel with sure means of determining for purposes of appeal that judgment has been entered and the time of its entry. This subdivision contains two

other important innovations. The first causes the running of appeal time to be tolled by the filing of a post-verdict motion under either Rule 50, 52 or 59 of the Rules of Civil Procedure, with the period recommencing upon the entry of an order upon the motion. (A result only partially achieved by 1971 amendment to G.S. § 1-279 which gave this effect only to Rule 59 motions.) The second avoids any further need for the so-called "protective" appeal by a party who is content to abide the judgment unless some other party takes appeal, but who wants to go up as an appellant if this transpires, and who therefore has been forced to give notice of appeal against the possibility that another party will take appeal at the last moment. This awkwardness is avoided by the provision that the timely taking of appeal by any party automatically gives all other parties 10 additional days from that time to note appeal.

Subdivision (d) includes a new requirement of specific elements to be included in a written notice of appeal. These conform to generally accepted ideas of what such a notice should contain and, indeed, to customary practice in this state. See F.R.App.P. 3(c) and 3 *Douglas Forms*, Form 1168. In particular, the specification of the exact order or the portion of a judgment from which appeal is taken may save against occasional confusion. Federal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal. See, e.g., *Higginson v. U.S.*, 384 F. 2d 504 (6th Cir. 1967) (wrong order designated; deemed corrected by correct identification in brief); *Graves v. General Insurance Corp.*, 381 F. 2d 517 (10th Cir. 1967)

(designation of wrong court harmless under circumstances). See Committee Forms 1 and 2.

Subdivision (e)'s cross-reference to the general "Filing and Service" rule, Rule 26, is made in order to insure counsel's attention to the variety of means by which service of the required copies of the notice of appeal may be made. See Commentary to subdivision (a), section (2). Since "taking" appeal by written notice requires both filing and service within the 10-day period, App. R. 3(a)(2), counsel must be careful to effect service as well as filing within the time. The most obvious way to do this is by the use of mail which, properly posted, is effective upon posting, or, where convenient, hand delivery to counsel or to an employee or partner at his office. App. R. 26(c). Service by an officer, though authorized by this same subdivision of Rule 26, is of course less subject to control, and will be effective only upon consummation of service.

General. It should be noted that the statutes which have heretofore been the sole sources for the procedure in "taking" appeal, G.S. §§ 1-279, 1-280 (for civil appeals) and G.S. § 15-180 (which for criminal appeals simply borrowed the civil procedure), have been substantially amended to incorporate the basic changes in this procedure which is now incorporated in this Rule 3 and in following Rule 4 (for criminal appeals). Indeed, the controlling statutes and Rules now simply replicate each other. See G.S. § 1-279, as re-written in 1975, and G.S. § 15-180.3, enacted in 1975, to parallel the two rules in the respects described in the rule commentaries.

Editor's Note. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

Subsection (a) is almost identical to § 1-279(a). *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The provisions of § 1-279 and this rule are jurisdictional and unless these statutes are complied with, the appellate court acquires no jurisdiction of the appeal and it must be dismissed. *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Section 1-279 and this rule requires both filing and service of notice of appeal within 10 days after entry of judgment. *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Applied in *Arnold v. Varum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977); *Harrington v. Harrington*, 38 N.C. App. 610, 248 S.E.2d 460 (1978).

Cited in *In re Williamson*, 32 N.C. App. 616, 233 S.E.2d 677 (1977); *Parrish v. Cole*, 38 N.C. App. 691, 248 S.E.2d 878 (1978).

Rule 4

Appeal in Criminal Cases — How and When Taken

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

- (1) giving oral notice of appeal at trial, or
- (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after entry of the judgment or order or within 10 days after a ruling on a motion for appropriate relief made during the ten-day period following entry of the judgment or order.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 15-180, 1-279, 1-280.

Commentary.

See the *General Commentary* to Rule 3 which points out the statutory amendments made in conjunction with promulgation of these rules to bring the two into conformity on the procedure for taking appeal from the trial courts.

Subdivision (a) carries forward traditional practice by which in criminal cases (borrowing the code procedure for civil appeals) appeal may be taken either by oral notice given at trial or by written notice within a specified time after judgment. The traditional time of 10 days is also carried forward. Under formerly controlling statutes (G.S. § 1-279, borrowed for criminal appeals by G.S. § 15-180) this time commenced to run upon "rendition" of judgment, and by judicial interpretation this event was fixed as the last day of the session at which rendered. This judicial gloss is now incorporated expressly in the Rule to accord with customary practice. (Note that this differs from the starting point for the running of time in civil appeals, which is the date of "entry" of judgment under Rule 58 of the Rules of Civil Procedure. See commentary to subdivision (a) of Rule 3.) Taking appeal, when written rather than oral notice is given, involves both *filing* and *service* of the notice, with service of copies required only upon *adverse* parties. (Note again a difference from the procedure in civil appeals, under which per App. R. 3(a) and (b)

service is required upon all *other* parties.) Obviously, when a criminal defendant appeals, there is only one such adverse party, the State. G.S. § 1-5. In the infrequent situations in which the State may appeal, G.S. § 15-179, if there are multiple defendants, service must be upon all of them. The reasons for not requiring criminal defendants to serve copies upon any co-defendants are: 1) the practical difficulty of doing so in situations of confinement, and 2) the absence of any provision in criminal appeals similar to that in Rule 3(c) for civil appeals which tolls the running of appeal time for all other parties when timely appeal is taken by any party.

Because it is not the practice to enter any judgments or orders from which appeal would lie in a criminal action except during a session of court, this Rule 4 does not contain any provision like that in App. R. 3(b) which provides for appeals in civil actions from judgments rendered out of session. If an appealable judgment or order were to be entered out of session (whether authorized or not), it is obvious that appeal must then be taken by filing and serving written notice.

Subdivision (b). See commentary to subdivision (d) of Rule 3, and Committee Forms 1 and 2.

Subdivision (c). See commentary to subdivision (e) of Rule 3.

Editor's Note. — The amendment adopted October 4, 1978, effective January 1, 1979, substituted "after entry of the judgment or order or within 10 days after a ruling on a motion for appropriate relief made during the 10-day period following entry of the judgment or order"

for "after the last day of the session at which rendered" at the end of subdivision (2) of subsection (a).

Cited in *State v. Morris*, 41 N.C. App. 164, 254 S.E.2d 241 (1979).

Rule 5

Joinder of Parties on Appeal

(a) **Appellants.** If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) **Appellees.** Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder.** After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

Drafting Committee Note

Sources and parallels in rules and statutes: None.

Commentary.

While former statutes and rules obviously contemplated appeals involving multiple parties, and occasionally alluded to the special problems thereby created (as in Sup. Ct. R. 19(2)), they were basically designed to fit the single appellant-single appellee pattern. Specifically, they made no direct provision for joinder on appeal of either appellants or appellees. Since this can be a helpful procedure, this Rule 5 directly authorizes it and lays down quite simple procedures to accomplish joinder. While joinder of appellants will be much more common, appellees may also desire to join on occasion, and subdivision (b) provides for this. The main

advantage derived from joinder on either side is reduction in the paper work and effort required, particularly in respect of service of various papers required to be served on all parties. Subdivision (c) cross-refers to a provision in Rule 26, the general filing and service rule, which makes service on any party joined on appeal service on all so joined, thereby insuring this advantage.

Related Rules dealing with other aspects of multiple-party appeals are Rule 11(d) (single record on appeal despite multiple appellants proceeding separately); Rule 26(f) (service on numerous parties proceeding separately); and Rule 11(b) and (c) (procedure for settling record where multiple appellees proceeding separately).

Rule 6

Security for Costs on Appeal in Civil Actions

(a) **In Regular Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. §§ 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. § 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (b), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-285, 1-286, 1-287, 1-288; Court of Appeals Rule 6(a).

Commentary.

Subdivision (a) simply cross-refers to the statutes which require that ordinarily security for costs be provided as a condition to the right to prosecute an appeal and prescribe the mode of setting and perfecting such security. This basic requirement bears so directly upon the financing of the court system that it seems properly a matter for legislation rather than judicial rule-making as the authoritative source. Cross-reference in these Rules is simply in the interest of the completeness of their coverage of each critical step in the process.

Subdivision (b) similarly cross-refers to the statutory exception to the basic requirement — that of appeals in forma pauperis — and is for the same purpose as stated for subdivision (a).

Subdivision (c) carries forward a requirement of former Court of Appeals Rule

6(a) that the appeal bond be filed *with* the record on appeal. That rule did not, as does this, make alternative provision for filing certificate of the provision of cash deposit in lieu of bond, an alternative clearly permitted by G.S. § 1-286.

Subdivision (d) picks up procedures formerly spelled out in G.S. §§ 1-285 and 1-287 by which failures properly to provide required security or to file evidence thereof with the record on appeal may be brought to the attention of the appellate court and made the basis of dismissal or of correction. These provisions have been removed from the cited statutes by 1975 amendments on the basis that they pertain more properly to the appellate rule-making power. The substance of these procedures is unchanged, so that no change of established practice is involved. The cross-reference is to the general motion practice rule, Rule 37.

Rule 7

[Reserved]

Editor's Note. — Rule 7 was repealed by amendment effective July 1, 1978, adopted June 19, 1978.

The order repealing this rule provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes,

G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

Rule 8

Stay Pending Appeal in Civil Actions

When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

Drafting Committee Note

Sources and parallels in former rules and statutes: Former Sup. Ct. R. 34(2).

Commentary.

The act of taking appeal in a criminal case automatically stays execution of judgment pending disposition of the appeal. G.S. § 15-184. The situation is not as simple with respect to civil judgments, and this Rule speaks to that situation in order to interrelate the procedures for obtaining stay of execution of such judgments at the trial court level with the supersedeas writ practice by which stay may be obtained from an appellate court under the provisions of App. R. 23.

The procedure for obtaining stays at the trial court level is controlled by N.C.R.Civ.P. 62. That rule contains internal provisions for obtaining stays of some judgments by motion, and

cross-refers to certain statutes which provide for automatic stays of other specific judgments by deposit of security in the trial court. The basic thrust of this Rule 8 and the interrelated supersedeas rule, App. R. 23, is to require that, ordinarily, a party must have attempted unsuccessfully to obtain or to hold a stay order at the trial court level under the provisions of N.C.R.Civ.P. 62, before being permitted to seek stay by writ of supersedeas from the appellate court. "Stay order" as used in this rule includes orders which are in effect continuations of injunctive relief which has been vacated by the trial court judgment or order from which appeal has been taken, or which "suspend," pending disposition of an appeal, injunctive relief granted by the judgment or order from which appeal is taken. See N.C.R.Civ.P. 62(c).

Rule 9

The Record on Appeal — Function, Composition, and Form

(a) **Function.** In appeals of right from the district courts and superior courts, review is solely upon the record on appeal constituted in accordance with this Rule 9.

(b) **Composition.**

(1) **In Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons with

return, or of other papers showing jurisdiction of the trial court over person or property, or a copy of a stipulation of counsel showing the same; (iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law; (viii) a copy of the judgment, order, or other determination from which appeal is taken; (ix) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (x) copies of all other papers filed and transcripts of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned, and (xi) exceptions and assignments of error set out in the manner provided in Rule 10.

(2) In Appeals from Superior Court Review of Administrative Boards and Agencies. The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a copy of a stipulation of counsel showing the same; (iv) copies of all petitions and other pleadings filed in the superior court; (v) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (vi) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (vii) so much of the evidence taken before the board or agency and in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the superior court, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the superior court, set out as provided in Rule 10.

(3) In Criminal Actions. The record on appeal in criminal actions shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court; (iv) copies of docket entries or of a stipulation of counsel showing all arraignments and pleas; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken; (viii) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (ix) copies of all other papers filed and proceedings had in the trial courts which are necessary for an understanding of all errors assigned, and (x) exceptions and assignments of error set out as provided in Rule 10.

(4) Order of Arrangement. The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(5) **Inclusion of Unnecessary Matter: Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(6) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative the appellate court may order additional portions of a trial court record sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal amended to correct error shown as to form or content.

(c) **Form — General Provisions.**

(1) **Evidence — How Set Out.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(b) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form.

Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Exhibits.** (i) Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by stipulation of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(ii) Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed as part of the record on appeal. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the court to which appeal is taken. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the record on appeal.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively. At the end shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-282, Sup. Ct. (and Ct. App.) Rules 19, 20, 21, 22, 23, 26.

Commentary.

General. This Rule, in subdivision (b), contains a fundamentally new approach to prescribing the composition of the record on appeal. The traditional formula of the code and implementing rules of a "record proper," supplemented where required by a "settled case on appeal," is here abandoned in favor of a detailed enumeration of required items for each of the three types of cases which can be appealed from the trial courts to the appellate courts: civil actions, subd. (b)(1); criminal actions, subd. (b)(2); and appeals from superior court administrative agency reviews, subd. (b)(3). Over the years the practice had already essentially moved around the theoretical code design, as the exact composition of the "record proper" became less and less clear. The device of a specific listing of items is designed to make more certain the process of composing the record on appeal and so to reduce some of the confusion clearly indicated in records and court discussions of imperfectly composed records arising to some extent from the code terminology and its related procedures.

While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal, it retains the two most fundamental features of the code approach. 1) Use of authenticated copies of trial court record items (plus reporter's transcript), rather than the original trial court papers themselves; and 2) A forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on the original papers" approach now utilized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief. The selection process under this Rule is dictated with respect to enumerated items which may or may not be relevant from case to case, such as jury instructions and other elements of the trial process, by those provisions which admonish inclusion only "when necessary to understand errors assigned." It is in this way that the case-by-case flexibility of composition of the code's "settled case" is carried forward. Counsel should be alert to one fundamental change which this approach involves. Formerly, if appeal could be prosecuted on the "record proper," appellant need not either obtain agreement of appellee nor make service upon him of a "statement of case on appeal," but could merely have the clerk certify the items constituting the "record proper," and docket this

as the complete "record on appeal" in the appellate court. See, e.g., *Edwards v. Edwards*, 261 N.C. 445 (1964) (appeal from judgment on the pleadings). Under the new rule, even in such a case he must either obtain agreement of counsel to these items as the "record on appeal" under Rule 11(a), or serve them upon him in a "proposed record on appeal" for acceptance under Rule 11(b) or judicial settlement under Rule 11(c).

While the Rule requires routine inclusion in the record on appeal of all those items which clearly would have been considered parts of the "record proper" under the code (e.g. items iii, iv, vii, viii of subd. (b)(1) for civil appeals), it should be noted that Rule 12(c) provides that even these items may be excluded from those work copies of the formal record on appeal actually prepared by the appellate court clerk for direct consideration by the members of his court. This lays the basis for a two-stage selection process which if carefully followed will produce: 1) an original record on appeal, available for inspection by the court, which is broad enough in scope to allow fair consideration in relevant context of all errors properly to be considered; but 2) "work" copies for individual members of the courts from which have been excluded any formally required items in the original record (such as pleadings, jurisdictional statements or papers) which are not relevant to consideration of particular errors assigned by the parties. Cf. former Sup. Ct. R. 22 and see Commentary to Rule 12(c).

Subdivision (b)(1)-(3). While most of the items enumerated for inclusion in the original records on appeal in these three categories of cases are self-explanatory, it may be helpful to relate some to practice under former statutes and rules.

Item (ii) in subsections (1), (2), (3): "a statement identifying the judge, etc." This is designed to perform the function of the "organization of the court" item indirectly required by former Sup. Ct. R. 22, and traditionally included by counsel in widely varying form in the original record on appeal. The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of the particular trial judge and tribunal, whether or not any jurisdictional question has been directly raised by the parties on appeal. See N.C.R.Civ.P. 12(h)(3) (lack of subject matter jurisdiction may be noted by court at any stage of proceedings). The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice. If peripheral questions of "organization" such as the composition of grand or petit jury are to be drawn in question, this should be done by specific assignment of error with relevant parts of the record specially included.

Item (iii) in subsections (1) and (2), “a copy of the summons, etc.” This is designed to provide a record showing of the existence of “judicial” jurisdiction of the trial tribunal, whether personal over the defendant, in rem, or quasi in rem, and however based and exercised. Under Code practice it had consistently been understood that the *summons* constituted a part of the “record proper,” so must be included in the original record on appeal. *Cressler v. City of Asheville*, 138 N.C. 484 (1905) (“summons, pleading and judgment”). And Sup. Ct. R. 22 built indirectly upon this by providing that the summons so included need not be included in the “printed” copies prepared by the Clerk. Both of these prescriptions, framed in an earlier day of simple process and jurisdiction rules, were too narrowly confined in terms, seemingly only to cases where personal jurisdiction has been acquired by personal service of process. This new Rule speaks more contemporaneously and accurately to the underlying necessity, which is for a record showing of “judicial” jurisdiction, whether over person or property, and whether acquired by service of summons, publication, notice, appearance, waiver, or however.

Item (ix) in subsection (1); (viii) in subsections (2) and (3), “a copy of the notice of appeal, etc.” This carries forward existing practice, not formerly required by statute or rule but by judicial decision, e.g., *Atkinson v. Asheville St. Ry.*, 113 N.C. 581 (1893), of including in the record on appeal a showing of appeal properly taken and perfected. This establishes as a matter of record the jurisdiction of the *appellate court* in the particular case. The way in which this has traditionally been shown is by the standardized “appeal entries” which show appeal taken orally “in open court,” “further notice waived” (unnecessary), accompanied by any judicial extensions of the statutory times for serving “case” and “counter case,” and the amount of appeal bond. This may certainly be continued under this Rule, but the Rule would also be complied with by inclusion of a copy of a written notice of appeal with proof of service under Rule 3(a)(2), or 3(b) and with separate showing of any judicial orders extending times for perfecting appeal. See Committee Form 5, “Appeal Entries.”

Subdivision (b)(4). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (b)(5). Former Sup. Ct. R. 26 provided for recovery of the costs of printing records and briefs by the party prevailing, but limited recovery on a maximum page/maximum per page cost basis. This operated indirectly, and in experience not too successfully, as a deterrent to inclusion in the record on appeal of unnecessary matter. Former Sup. Ct. R. 26 and 19(5) also provided a more direct sanction of costs against the party responsible for the inclusion of unnecessary matter in the record on

appeal, without regard to outcome of the appeal. This sanction had apparently seldom been invoked. This subdivision of the new rule abandons the page/cost per page limitations on recovery of printing costs by a prevailing party, and retains the sanction of imposing costs of unnecessary portions on the offending party. It has two new features: 1) The sanction is not dependent upon an opposing party's objection, but may be imposed by the court on its own initiative; 2) The costs are chargeable directly against *counsel* as well as a party in the court's discretion.

Subdivision (b)(6). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (c)(1). The problem of incorporating evidence in the record on appeal has two aspects: 1) determining that portion of the total received (or offered) to be included, and 2) the mode of setting out *testimonial* evidence. This subdivision addresses the latter aspect.

The best possible incorporation of testimonial evidence in a record on appeal would 1) include no more than is minimally required for reviewing errors assigned; 2) set out in narrative summary form that which merely lays an undisputed factual context or provides an undisputed factual background; and 3) set out in question-and-answer form all that wherein shades of meaning, nuances of expression, and ambiguity of question or response, bear obviously upon the sense and credibility of testimony. An all-narrative summary undoubtedly obscures the true sense of much critical testimony, tends to encourage inclusion of unnecessary portions, and is exceedingly time-consuming. An all-verbatim transcript inevitably includes long passages of confused questions and answers frequently leading finally to the establishment of purely peripheral fact which though necessary as context or background is not really disputed and could be compressed fairly into summary form. Generally speaking, it is obvious that a narrative form is easier for the reviewing court to use, while a verbatim question-and-answer form is easier for counsel to prepare. The problem has been and remains one of accommodation to these conflicting interests and values. This subdivision attempts a new accommodation. Its first sentence continues, for obvious reasons, the traditional requirement that evidence whose admission or exclusion is assigned as error be included in question-and-answer form. The rest of the subdivision involves a limited relaxation of the former flat requirement of narrative form for all other testimonial evidence included. The idea expressed is that this remains the ordinarily preferred and required form, but with the option given to use question-and-answer form where the narrative would obscure particular testimony's true sense. With this option given, it may inevitably become the object of

disagreement between counsel during the process of composing the record on appeal. To aid both counsel and any judge required to settle such a dispute as to form, the last paragraph of this subdivision is devoted to a general statement of the considerations properly to be used in determining the fitness of the particular mode in dispute. These are to be brought into play in the normal process, set out in Rule 11, of settling the record — whether by agreement, acceptance through adversarial exchange, or judicial settlement. In this process the appellant will obviously have the first opportunity to choose the form or forms to be used (after having first selected those portions of the total evidence which are to be included in any form). This choice might be exercised informally in a proposal to the appellee for an agreed record on appeal, or in a formal “proposed record on appeal” served upon the appellee. In the latter situation an appellee might either formally object to the proposed form, or include a different form in his “proposed alternative record on appeal.” In either case, judicial settlement as to the propriety of the disputed form would then be forced.

Subdivision (c)(2) deals in its two subsections with two different kinds of exhibits which may

be required items in the record on appeal. Subsection (i) deals with documentary exhibits (ordinarily will not have been introduced in evidence) which are attached to or are parts of items required to be included in the record on appeal under Rule 9(b) (such as pleadings). On motion these may be excluded as unnecessary to the appeal from the item of which they are a part or to which they are attached, though the item itself must be included in the record on appeal. Subsection (ii) deals with evidentiary exhibits, both documentary and other, which are required items in the record on appeal. If documentary, three copies must be filed with the record. If not documentary only the original, for obvious reasons, need be filed. To protect clerks in their custodial responsibility against the possible loss or damage to such exhibits, G.S. § 7A-106, the rule provides that these may be transmitted directly by the clerk to his appellate court counterpart without relinquishing their custody to counsel.

Subdivision (c)(3). Self-explanatory. From former Sup. Ct. R. 19(1).

Subdivision (c)(4). Self-explanatory. From former Sup. Ct. R. 19(1).

The defendant appellant has the duty to see that the record on appeal is properly made up. *State v. McCain*, 39 N.C. App. 213, 249 S.E.2d 812 (1978).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

Objection When Ruling Made. — Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

A judgment is a necessary part of the record on appeal of a criminal action. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by § 1-180. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

Narration of the evidence as specified in subdivision (c) is mandatory. *Britt v. Allen*, 291 N.C. 630, 231 S.E.2d 607 (1977).

Subsection (b) (3) (ix) is broadly worded so as to include any proceeding in any court which would be material to the consideration of the case on appeal. If there is a question as to the relevancy of the proceedings from other courts, the parties may settle the dispute according to the procedures provided in Rule 11. The trial judge properly ordered the inclusion of the voir dire of a previous trial into the record. *State v. Cumber*, 32 N.C. App. 329, 232 S.E.2d 291, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

Counsel Taxed with Costs for Filing Redundant Records. — Because counsel representing one codefendant and counsel representing the other defendants filed two records instead of one and because they included unnecessary material in each of the records filed, each counsel will be personally taxed with a portion of the costs. *State v. Bryson*, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing

of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. *State v. McKenzie*, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Because of the filing of an unnecessary record on appeal and because unnecessary matter was included in the records filed, counsel for defendants will be personally taxed with a portion of the costs. *State v. Ashe*, 30 N.C. App. 74, 226 S.E.2d 398 (1976).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. *State v. McKenzie*, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Minutes Are Not Substitute for Copy of Judgment.—The “minutes” of the trial court in a criminal action included in the record on appeal are not a substitute for a copy of the judgment. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a

showing of compelling circumstances. *State v. McKenzie*, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Omission of Necessary Part of Record.—When a necessary part of the record on appeal of a criminal action has been omitted, the appeal will be dismissed. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Applied in *Johnson v. Hooks*, 27 N.C. App. 584, 219 S.E.2d 664 (1975); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976); *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976); *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976); *State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976); *State v. Chavis*, 30 N.C. App. 75, 226 S.E.2d 389 (1976); *State v. Pevia*, 30 N.C. App. 79, 226 S.E.2d 394 (1976); *Williams v. Williams*, 31 N.C. App. 747, 230 S.E.2d 428 (1976); *State v. Ellis*, 32 N.C. App. 226, 231 S.E.2d 285 (1977); *State v. Kessack*, 32 N.C. App. 536, 232 S.E.2d 859 (1977); *State v. Musumeci*, 33 N.C. App. 88, 234 S.E.2d 31 (1977); *State v. Dixon*, 33 N.C. App. 78, 234 S.E.2d 37 (1977); *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977); *State v. Spruill*, 33 N.C. App. 731, 236 S.E.2d 717 (1977); *State v. Hugenberg*, 34 N.C. App. 91, 237 S.E.2d 327 (1977).

Quoted in *Dawkins v. Dawkins*, 32 N.C. App. 497, 232 S.E.2d 456 (1977).

Cited in *State v. Crews*, 296 N.C. 607, 252 S.E.2d 745 (1979).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) Exceptions.

(1) **General.** Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.

(2) **Jury Instructions; Findings and Conclusions of Judge.** An exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury or to make a particular finding of fact or conclusion of law which was not specifically requested of the trial judge shall identify the omitted instruction, finding, or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

(c) **Assignments of Error — Form.** The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to which it is directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) **Exceptions and Cross Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), or may be included by the appellee in a proposed alternative record on appeal under Rule 11(b).

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-282; Sup. Ct. Rules 19(3) and 21.

Commentary.

General. A necessary feature of any system of appellate procedure which uses a selectively composed record on appeal rather than the entire trial court record is some such sifting process as that embodied in the "exception/assignment of error/questions presented in brief" process brought forward in these rules from code practice. The function and operation of this essential process have been poorly described in former rules and statutes and erratically applied in practice. It is the purpose of this Rule 10 better to describe both intended function and details of operation in an effort to improve practice in this critical area.

Subdivision (a) seeks to express the intended function of this process, and does so in a paraphrase of various formulae used by the courts over the years in their frequently frustrated attempts to police the practice. See, e.g., *State v. Dickman*, 249 N.C. 759 (1959); *Nye v. Devel. Co.*, 10 N.C. App. 676 (1971). The sifting

function which is implicit in this statement might be expressed in more specific form as follows. 1) Every judicial action at the trial court level constitutes potentially prejudicial error to the party disfavored by it; hence the total of such actions which disfavor the eventually losing or "aggrieved" party constitute the pool of potentially reversible errors on appeal. 2) But no such error ought be the subject of appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it, or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel. The classic way of making a required suggestion of error in the trial court is by the formal "exception" orally announced, or presented in writing in apt time. Other less formal means of suggesting error may of course be equally effective, so that an "exception" may be "preserved" by them. N.C.R.Civ.P. 46(b) ("formal exceptions . . . unnecessary"). Other error may be considered of such serious consequence that it requires no suggestion from counsel, and is by law "deemed excepted to." N.C.R.Civ.P. 46(c) (instructions to jury). 3)

Whether an exception to it has been actually taken or merely “deemed” taken, the fact that error will be asserted on appeal in respect of particular judicial action must be noted in the record on appeal, first for the benefit of the adverse party, then for the reviewing court. This requires that each such exception be there “set out” in some way which sufficiently identifies the judicial action to which it is addressed. 4) All such exceptions should then be made the basis of formal “assignments of error” in the record on appeal. These constitute in effect the “pleadings” on appeal, for they signal to the adversary the points of law which will be urged on appeal. Each should be confined to a single issue of law, and all exceptions pertinent to this issue should be visibly “grouped” under that assignment of error. This fixes the potential scope of review, and therefore enables the appellee to assess the appropriateness of the record on appeal as proposed by the appellant. 5) From among these “assignments of error” the appellant may choose in the final stage of the sifting process to use all or less than all as the basis for the questions formally to be presented for review in his written brief. These “questions presented” ultimately define the scope of review. Hence the formula: “questions presented must be supported by assignments of error which must be supported by exceptions.” Or, obversely: “exceptions not made the basis of assignments of error, and assignments of error not made the basis of questions in the brief, are deemed abandoned.” The last sentence proviso expresses the limited exceptions to this basic scheme. The three defects there identified are all of such fundamental significance — going to the jurisdiction of the court and to the question whether the judgment is supportable on the issues before the court — that no exception or assignment of error is required to permit their consideration on appeal. Cf. former Sup. Ct. R. 21 and see *Burroughs v. Realty Co.*, 19 N.C. App. 107 (1973). This subdivision is designed to highlight the underlying purpose behind the exception/assignment of error process in order to make more understandable the desired form and function of the two devices. These are then addressed in the next two subdivisions.

Subdivision (b)(1). The first sentence builds upon the point developed in the commentary to subdivision (a), that only those “exceptions” may be set out in the record on appeal and so made the basis of assignments of error which were taken in the trial court by the classic mode of the spoken or written word “exception”; or “deemed” taken from other conduct, as by objecting to the admission of evidence, N.C.R.Civ.P. 46(a)(2), or from other action plainly indicating opposition to judicial action taken or proposed, N.C.R.Civ.P. 46(b); or “deemed” taken without *any* action by counsel simply because the error is considered

sufficiently fundamental, as in instructions to the jury, N.C.R.Civ.P. 46(c).

It is obvious from this that it is rarely the case that an “exception” set out in the record on appeal will necessarily reflect the actual taking of a formal exception at trial. This points to the true, and limited, function of the exception “set out” in the record on appeal: it is merely to provide a visible reference point in the record on appeal for the reviewing court to locate the particular judicial action assigned as error. Recognition of this quite limited function of the exception in the record on appeal explains the next two sentences in the subdivision. By the first, it is provided that a formal “bill of exceptions” need no longer be filed. Without using the exact term, former Sup. Ct. R. 21(c) plainly contemplated the filing of such a “bill” in all situations “when no case settled is necessary”, i.e., when the judicial action to be assigned as error occurred with respect to a matter included in the “record proper” — such as the entering of judgment on the pleadings. When formal exception to such action at the trial court level was required in order to “preserve” exception for inclusion in the record on appeal, a written bill filed with the trial court was obviously necessary. Under N.C.R.Civ.P. 46, however, no “formal exception” to such an order is now necessary just so long as counsel resisted allowance of the motion. An exception may now be set out in the record because by this trial rule it is deemed “preserved” by that action. Of course this does not obviate the necessity that there shall have been such a plain indication by counsel of his opposition, and a written “exception” filed with the court would clearly still perform that function, whether denominated a “bill” or not. The next sentence makes plain this limited function by emphasizing that it consists simply of pointing out in the record on appeal the particular judicial action to be assigned as error, and that this does not require any statement of grounds or argumentation. The last sentence of this subsection carries forward traditional practice of consecutive numeration of the exceptions set out in the record on appeal. See Committee Form 6 A-C for illustrative examples.

Subdivision (b)(2) carries forward in its first sentence traditional practice for the clear identification of portions of the judge’s charge to which exception is being set out in the record. The second sentence involves a change in the practice recently required by the court for identifying instructions whose *omission* is to be assigned as error. This requirement has been that at least a paraphrase of the instruction which counsel contends should have been given should be set out in brackets following the instructions actually given, with an appropriately numbered exception identifying it. *Duke Power Co. v. Rogers*, 271 N.C. 318, 321

(1967). By this new rule it is sufficient in such case to give the *substance* of the instruction which allegedly should have been given, rather than attempting even to paraphrase the instruction as it is contended the judge should actually have phrased it. See Committee Form 6 D.2. The same requirement is made applicable to the related subject of an exception to the failure to make certain findings of fact or conclusions of law in a non-jury case. The last sentence carries forward an established rule of decision which has prohibited "broadside exceptions" to multiple findings or conclusions. *Logan v. Sprinkle*, 256 N.C. 41 (1961).

Subdivision (c) in its first three sentences restates in condensed form the basic function and desired form of the assignment of error as developed in judicial decisions over the years. As indicated in the general commentary to this Rule, the essential function of this device is to identify for the appellee's benefit all the errors possibly to be urged on appeal, hence the total possible scope of review, so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position on all these points. This being the function, it is sufficient that the assignment of error simply identify without argumentation the basis upon which it is asserted that error was committed, and that it identify, by simply listing ("grouping") them, the various exceptions upon which it is based. The last sentence represents a fundamental change in the required form, as the court in deference to the burden imposed upon counsel abandons the long-standing requirement that each assignment of error contain within itself those portions of the record necessary to its consideration. This rule apparently originated in 1908 in the case of *Thompson v. Railroad*, 147 N.C. 412 (1908) where the Court, faced with a particularly sketchy set of assignments, adopted it in order to avoid the necessity for "making a voyage of discovery" through the record in order to deal with each assignment. This rule has been exceedingly difficult to police consistently, see *Douglas v. Mallison*, 265 N.C. 362 (1965), and *State v. Douglas*, 268 N.C. 267 (1967), and is abandoned in this rule in the hope that counsel will specify the basis of their assignments and identify the exceptions underlying them with sufficient clarity that the Court can fairly and expeditiously consider them as framed. See Committee Form 7 for illustrative examples.

Subdivision (d) introduces a new procedure designed to protect appellees who have been

deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based. There has not been a clear-cut procedure of this sort. Such parties may not protect their judgments by becoming cross-appellants, since they are not parties aggrieved under G.S. § 1-271. *Bethea v. Town of Kenly*, 261 N.C. 730 (1964). Nor has there been a general provision by which they might as appellees "conditionally" assign error in the event the appellate court should "aggrieve" them by its decision depriving them of their favorable judgment below. Such a provision has been worked into the aggrieved party statute, G.S. § 1-271, to protect an appellee in the limited situation where as verdict winner below he wishes to argue conditionally on appeal for new trial as opposed to the judgment n.o.v. sought by appellant. It is undoubtedly the case that on occasion the Court has protected an appellee in this situation by drawing on the principle that "review is to correct judgments and not reasons." See, e.g. *Jamerson v. Logan*, 228 N.C. 540 (1948) (though plaintiff appellee's verdict not supportable on issues submitted, case remanded rather than reversed on basis prima facie case well pleaded and proved on theory not submitted to jury). But in such situations, it may well be that the appellant has not been fairly apprised of this possibility and so enabled to meet this conditional position. Both appellees and appellants should be protected in this situation, and this subdivision seeks to provide this protection by allowing an appellee conditionally to present such issues but only on the basis of cross-assignments of error which will have alerted appellant to this possibility and permitted him to protect himself both in terms of composition of the record on appeal and in preparing his brief and oral argument on the "cross-questions." Rule 28(c), which prescribes the contents of briefs, follows up on this by permitting an appellee who has made such cross-assignments of error to present in his brief for appellate review the questions thereby raised. And Rule 16, which deals with review by the Supreme Court or Court of Appeals determinations, ties in by permitting a party who as appellee presented such "cross-questions" in the Court of Appeals to present them for further review in the Supreme Court, whether he appears there as appellant or as appellee.

Question Must Be Presented on Appeal. — The proviso to subdivision (a) allows review of the questions, without exceptions or

assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal

sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of App. R. 28 that a question must be presented and argued in the brief in order to obtain appellate review of it. *State v. Brothers*, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

Waiver by Failure to Present Question on Appeal. — Where the defendant in a murder prosecution did not assign as error on direct appeal the failure of the trial judge in his instructions to place the burden of proving the absence of heat of passion or the absence of self-defense on the State, he waived his right to complain about such errors in post-conviction review. *State v. Watson*, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, S.E.2d (1978).

Evidence Incompetent by Statute. — Failure of the trial judge to exclude evidence rendered incompetent by statute is reversible error, whether objection is interposed and exception noted or not. *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976).

Another exception to the waiver rule implicit in subdivision (b) is the admission of evidence contrary to a statute which precludes its admission in furtherance of some public policy of the State. In this instance failure to object to the evidence does not waive one's right to have the error considered on appeal. *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976).

Discretion of Trial Judge. — A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. *State v. Hensley*, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

An objection to testimony not taken in apt time is waived. *State v. Hensley*, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the admission of incompetent evidence, must be made in apt time or else be lost. *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, aff'd sub nom. *Carter v. North Carolina*, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. *State v. Hedrick*, 289 N.C. 232, 211 S.E.2d 350 (1976).

Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. *State v. Hedrick*, 289 N.C. 232, 211 S.E.2d 350 (1976).

Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, aff'd sub nom. *Carter v. North Carolina*, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

While, ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission not assignable as error, this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute. *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976).

Except where the error complained of is so prejudicial that even upon timely objection no purported curative instruction could possibly remove the prejudicial effect, counsel's failure to make timely objection will not waive defendant's right to object under subdivision (b). *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976).

Or Where Questions of Jurisdiction or Sufficiency of Criminal Charge Are Raised. — Under this rule, upon appeal, any party may present for review, by properly raising the issue in the brief, the questions of whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law. This is true, notwithstanding the absence of exceptions or assignments of error in the record on appeal. *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976).

Under section (a) any party may present for review, by properly raising the issue in his brief, the questions of whether the court had jurisdiction of the subject matter and whether a criminal charge is sufficient in law. This rule applies even when no motion is made to quash. *State v. Jones*, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

A broadside exception presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record. *Mayhew Elec. Co. v. Carras*, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

A broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. *Mayhew Elec. Co. v. Carras*, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Capital Cases. — In every case where a death sentence has been pronounced, it is the practice of the Supreme Court to carefully review the entire record to determine if prejudicial error appears. *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge

might have given. *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, *aff'd sub nom. Carter v. North Carolina*, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

If after careful review of the entire record in capital cases error does appear, even though not assigned by defendant, the Supreme Court will take cognizance of the error *ex mero motu*. *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976).

If, upon an examination of the record for the ascertainment of reversible error in capital cases, error is found, it then becomes the duty of the Supreme Court upon its own motion to recognize and act upon the error so found. *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976).

The necessity for identifying the instruction objected to has long been the established practice in North Carolina. The new rules merely clarify the requirement. *State v. Snyder*, 31 N.C. App. 745, 230 S.E.2d 599, *cert. denied*, 292 N.C. 268, 233 S.E.2d 395 (1977).

And Substance of Inadequacy Must Be Supplied. — Section (b)(2) of this rule means that when an appellant excepts to the inadequacy of the court's instruction on a particular point, in contrast to the court's failure to give any charge on the subject, appellant must set out the substance of the inadequacy, that is, substantially supply the omission which he contends rendered the charge insufficient. *State v. Freeman*, 295 N.C. 210, 244 S.E.2d 680 (1978).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by statute. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

In a prosecution for murder the trial court erred in allowing the defendant a new trial on the basis that the retroactivity of the Mullaney rule, see *Hankerson v. North Carolina*, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977), was applicable in this case in which the defendant appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. *State v. Watson*, 37 N.C. App. 399, 246 S.E.2d 25, *appeal dismissed*, 295 N.C. 652, S.E.2d (1978).

Applied in *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976); *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976); *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977); *Dawson Indus., Inc. v. Godley Constr. Co.*, 29 N.C. App.

270, 224 S.E.2d 266 (1976); *Foy v. Bremson*, 30 N.C. App. 662, 228 S.E.2d 88 (1976); *Wycoff v. Pritchard Paint & Glass Co.*, 31 N.C. App. 246, 229 S.E.2d 47 (1976); *Bullard v. North Carolina Nat'l Bank*, 31 N.C. App. 312, 229 S.E.2d 245 (1976); *Sturdivant v. Sturdivant*, 31 N.C. App. 341, 229 S.E.2d 318 (1976); *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977); *Borg-Warner Acceptance Corp. v. David*, 32 N.C. App. 559, 232 S.E.2d 867 (1977); *Dawson v. Sugg*, 32 N.C. App. 650, 233 S.E.2d 639 (1977); *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206 (1977); *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977); *Productive Tool Corp. v. Pilot Freight Carriers, Inc.*, 33 N.C. App. 241, 234 S.E.2d 758 (1977); *Moore v. Smith*, 33 N.C. App. 275, 235 S.E.2d 102 (1977); *State v. Tuttle*, 33 N.C. App. 465, 235 S.E.2d 412 (1977); *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977); *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977); *Neasham v. Day*, 34 N.C. App. 53, 237 S.E.2d 287 (1977); *State v. Cunningham*, 34 N.C. App. 72, 237 S.E.2d 334 (1977); *Parker v. Williams*, 34 N.C. App. 563, 239 S.E.2d 270 (1977); *State v. Graham*, 35 N.C. App. 700, 242 S.E.2d 512 (1978); *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978); *State v. Abernathy*, 36 N.C. App. 527, 244 S.E.2d 696 (1978); *Russell v. Taylor*, 37 N.C. App. 520, 246 S.E.2d 569 (1978); *Williams v. Dameron*, 37 N.C. App. 491, 246 S.E.2d 586 (1978); *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252 (1978); *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978); *State v. Hodges*, 296 N.C. 66, 249 S.E.2d 371 (1978); *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978).

Quoted in *Waters v. Qualified Personnel, Inc.*, 32 N.C. App. 548, 233 S.E.2d 76 (1977); *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977); *Cole v. Stevenson*, 447 F. Supp. 1268 (E.D.N.C. 1978).

Cited in *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976); *Patterson v. Weatherspoon*, 29 N.C. App. 711, 225 S.E.2d 634 (1976); *Privette v. Privette*, 30 N.C. App. 41, 226 S.E.2d 188 (1976); *State v. Willard*, 293 N.C. 394, 238 S.E.2d 509 (1977); *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977); *State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977); *Benton v. W.H. Weaver Constr. Co.*, 34 N.C. App. 421, 238 S.E.2d 655 (1977); *State v. Hice*, 34 N.C. App. 468, 238 S.E.2d 619 (1977); *Tadlock v. C.L. Snipes Motors, Inc.*, 34 N.C. App. 557, 239 S.E.2d 311 (1977); *State v. Truesdale*, 34 N.C. App. 579, 239 S.E.2d 286 (1977); *State v. Collins*, 35 N.C. App. 250, 241 S.E.2d 98 (1978); *Bridger v. Mangum*, 35 N.C. App. 569, 241 S.E.2d 726 (1978); *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E.2d 644 (1978); *Greensboro-High Point Airport Auth. v. Irvin*, 36 N.C. App. 662, 245 S.E.2d 390 (1978); *Lee v. Capitol Tire Co.*, 40 N.C. App. 150, 252 S.E.2d 252 (1979).

Rule 11**Settling the Record on Appeal; Certification**

(a) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 30 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 15 days after service upon him of appellant's proposed record on appeal, an appellee may file in the office of the clerk of superior court and serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of superior court, and served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of such a request the judge shall by written notice to counsel for all parties set a place and a time not later than 15 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the judge shall settle the record on appeal by order.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice

to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Certification of Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in this Rule 11, the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification. The clerk of superior court shall forthwith inspect the items presented and, if they be found true copies and transcriptions, certify them, noting the date of certification on the appropriate docket.

(f) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, 1-283, 1-284.

Commentary:

General. Using the change of terminology dictated by abandonment of the "record proper" — "case on appeal" function, see Commentary to Rule 9, this Rule carries forward the developed code process whereby the record on appeal is "settled" for filing in the appellate court — by party agreement, adversary approval through exchanges, or judicial order. The Rule also substantially alters the basic timetable for this process. See Table IV in the Committee's Table of Appendix and Forms. This new timetable attempts to accommodate to the realities of contemporary practice — most importantly, to the time required for securing a reporter's transcript — while nevertheless providing minimal basic times for the critical intervals. These basic intervals may of course then be altered in individual cases by extensions of time upon demonstrated necessity therefor. App. R. 27. This Rule leaves off the total process for perfecting an appeal at the time the record on appeal as settled is presented to the clerk of superior court for certification. The next step — filing the record in the appellate division — is picked up by Rule 12.

Subdivision (a) carries forward traditional practice (not heretofore expressly authorized in statute or rule) by which the parties may of course stipulate their agreement to the composition of a record on appeal. The time limit of 30 days expressed in this subdivision is tied to the basic 30-day period within which, by subdivision (b), an appellant must serve proposed record on appeal, or risk dismissal. These times must be related in order to keep the process moving. But the limit does not prevent later settlement by agreement. Obviously, even after adversarial exchange has begun, the parties should be free at any time to stipulate the record, and this is provided in subdivision (c).

Subdivision (b) describes the opening of the traditional adversarial exchange process, but on an altered basic timetable — 30 days for appellant to serve his proposed record (against 15 days under former G.S. § 1-282), and 15 days

for appellee to respond (against 10 days under former G.S. § 1-282). The subdivision concludes on the hypothesis that within the time permitted *all* appellees have either affirmatively approved or failed to make proper objection to the appellant's proposed record, whereupon by force of the rule this becomes the record on appeal. The specification of approval by *all* appellees accommodates to the possibility that in a multiple-appellee situation less than all will so approve by either means. That possibility is dealt with in the next subdivision.

Subdivision (c) picks up the adversarial exchange process at the point where a sole appellee or any one or more of multiple appellees have, within the time permitted them, filed objections or proposed alternative records on appeal (formerly "counter case" per G.S. § 1-283). At this point, any one of three different situations may exist: 1) there is a single appellee in the case; 2) there are multiple appellees, only one of whom files objections or a proposed alternative record; 3) there are multiple appellees, more than one of whom file objections or proposed alternative records. Former statutes dealt only with situation 1); this Rule deals with all three. 1) In the single-appellee situation, failure by the appellant to make timely request for judicial settlement results in settlement in accordance with the appellee's objections or proposed alternative record. Former G.S. § 1-283, which expressly dealt only with the single-appellee hypothesis, gave the same result. 2) Where only one of multiple appellees makes objection or serves proposed alternative record, the Rule permits request for judicial settlement either by appellant or by other appellees, failing which the record on appeal is settled in accordance with the one objecting appellee's objections or proposed alternative record. 3) In the third situation, where more than one of multiple appellees timely object or serve proposed alternative records, again the Rule permits request for judicial settlement either by appellant or any other appellees. But if there is failure by all parties in this situation so to request settlement, an impasse is created which cannot be resolved

by dictating settlement in accordance with a single set of objections or alternative record. Here there is inevitably inconsistency or conflict between multiple objections and proposed alternatives. The solution of the Rule is a forced one which imposes the penalty for failure to request settlement where it should be, on appellant. The appeal is deemed abandoned by him as to all appellees who did file objections or proposed alternative records. The appeal would stay alive against any approving or non-objecting appellees with the appellant's proposed record on appeal constituting the record. However, if within the time permitted any appellee in this situation requests settlement, the process continues to judicial settlement.

This subdivision also contains alterations in timetables controlling the actions described: 10 days to request settlement, measured from date within which last appellee might have filed objections (against 15 days from date of service of objections under former G.S. § 1-283); 15 days to hold settlement conference, measured from date judge receives request (against 20 days from receipt of request under former G.S. § 1-283).

Subdivision (d) picks up and elaborates upon a provision in former Sup. Ct. R. 19(2) for the composition of a single record on appeal in cases where there are multiple appellants. In any

situation where there are both multiple appellants and multiple appellees, the process described in subdivision (c) would be picked up at the point where the multiple appellants had agreed (by whatever procedure) to a single proposed record on appeal, and had served this upon the several appellees.

Subdivision (e). Former G.S. § 1-284, reflecting the two-component record on appeal of code practice, laid upon the clerk of superior court the literal duty to assemble the two (record proper and case on appeal) as soon as the latter was submitted to him in "settled" form, and then to "transmit" the whole to the appellate court clerk duly certified. In this as in other aspects of the practice built around the record proper-case on appeal model, practice had long since moved around design, and the clerk's function had become a much more modest one — of merely certifying the whole "record on appeal" as presented to him. This subdivision conforms to the developed practice, by its terms so confirming the clerk's function, and leaving to the appellant the responsibility for taking the next step — filing the record on appeal in the appellate division in accordance with succeeding Rule 12.

Subdivision (f) is a reminder that all the times provided in this Rule may be extended for cause under the procedures set out in Rule 27.

Time Schedule. — The time schedule set out in this rule is designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. *State v. Gillespie*, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232, S.E.2d 205 (1977); *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E.2d 836 (1976).

The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension. *State v. Motsinger*, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); *In re Allen*, 31 N.C. App. 597, 230 S.E.2d 423 (1976).

Record Must Be Settled before Certification.

— The clear implication of subdivision (e) of this rule is that the record must be settled before

certification. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Court Must Have Certification of Settled Record. — The appellate court must be assured that it has before it the certification of the clerk to the settled record, not the certification of the clerk to a record presented by the appellant. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. *State v. McKenzie*, 30 N.C. App. 64, 226 S.E.2d 385 (1976), cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

The filing of two records when there should have been but one and the inclusion in both records of matter which should not have been included has placed an unnecessary burden on this court and has imposed upon the State an expense which was not necessary for the protection of defendants' rights to full appellate review. *State v. Bryson*, 30 N.C. App. 71, 226

S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

Counsel Taxed for Redundant Record. — By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. *State v. McKenzie*, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. *State v. McKenzie*, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Applied in *State v. Cottingham*, 30 N.C. App. 67, 226 S.E.2d 387 (1976); *State v. Chavis*, 30 N.C. App. 75, 226 S.E.2d 389 (1976); *State v. Pevia*, 30 N.C. App. 79, 226 S.E.2d 394 (1976); *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976); *Hudson v. Hudson*, 31 N.C. App. 547, 230 S.E.2d 188 (1976); *State v. Davis*, 31 N.C. App. 590, 230 S.E.2d 203 (1976); *State v. Kessack*, 32 N.C. App. 536, 232 S.E.2d 859 (1977); *State v. Musumeci*, 33 N.C. App. 88, 234 S.E.2d 31 (1977); *Indian Trace Co. v. Sanders*, 33 N.C. App. 386, 235 S.E.2d 91 (1977); *Burkheimer v. Coble*, 35 N.C. App. 127, 239 S.E.2d 852 (1978); *Triplett v. Triplett*, 37 N.C. App. 283, 245 S.E.2d 812 (1978); *Williams v. Dameron*, 37 N.C. App. 491, 246 S.E.2d 586 (1978).

Cited in *State v. Cumber*, 32 N.C. App. 329, 232 S.E.2d 291 (1977); *State v. Davis*, 36 N.C. App. 648, 244 S.E.2d 480 (1978); *State v. Johnson*, 38 N.C. App. 111, 247 S.E.2d 286 (1978); *Triplett v. Triplett*, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

Rule 12

Filing the Record: Docketing the Appeal: Copies of Record

(a) **Time for Filing Record on Appeal.** Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal.** Prior to or at the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. §§ 1-288 or 15-181, the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed by him.

(c) **Copies of Record on Appeal.** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant shall pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-284, Ct. App. R. 3, 5.
Commentary:

Subdivision (a). The 150-day outer limit for

filing a record on appeal in the appellate court conforms to the 150-day limit to which, under former rules, time might be extended by a trial

tribunal for “docketing” appeal, former Ct. App. R. 5. The basic time intervals provided by App. R. 11 for perfecting appeal total 90 days to filing in the appellate division (as contrasted with 60 days under former statutes G.S. §§ 1-282, 1-283), thus giving a leeway of 60 days. The 150-day limit may itself be extended on motion, but only by the appropriate *appellate* court. App. R. 27 (c). As indicated in the commentary to App. R. 11, these time limits are intended to accommodate realistically to minimal constraints of contemporary practice.

Subdivision (b). This subdivision differentiates “filing” the record on appeal (a responsibility and function of the appellant) and “docketing” the appeal (a function of the clerk of appellate court). “Docketing” is the critical reference point in time for continuing the timetable for processing appeals (from this is measured the time for filing appellant’s brief, App. R. 13), hence the requirement of this subdivision that the clerk give immediate notice

to the parties of the date on which this ministerial act has been performed by him.

Subdivision (c). This subdivision continues the developed practice under which the responsibility for preparing printed “work-copies” of the formal record on appeal is routinely placed upon the appellate court clerk (Cf. former Sup. Ct. Rules 22, 23, and 25, which in terms give an option for prior printing by the appellant.) Hence the provision that only a single copy need be filed. This subdivision also contains the important provision alluded to in the General Commentary to Rule 9 for a further paring down of the “work-copies” from the original record on appeal by stipulation of parties. Cf. former Sup. Ct. R. 22. The mode of reproducing “work-copies” is not specified in this subdivision, in order to accommodate possible alternatives to the mimeographing specified by former rules. This as well as the number of copies is simply left to administrative direction of the particular court to its clerk.

Editor’s Note. — Section 15-181, referred to in this rule, was repealed by Session Laws 1977, c. 711, s. 33.

Applied in *Boone v. Fuller*, 30 N.C. App. 107, 226 S.E.2d 191 (1976); *In re Allen*, 31 N.C. App. 597, 230 S.E.2d 423 (1976); *Byrd v. Alexander*, 32 N.C. App. 782, 233 S.E.2d 654 (1977); *State v. Lesley*, 33 N.C. App. 237, 234 S.E.2d 476 (1977); *Indian Trace Co. v. Sanders*, 33 N.C. App. 386,

235 S.E.2d 91 (1977); *White v. Lawrence*, 33 N.C. App. 631, 236 S.E.2d 30 (1977); *City of Hickory v. Catawba Valley Mach. Co.*, 38 N.C. App. 387, 248 S.E.2d 71 (1978).

Cited in *State v. McDiarmid*, 36 N.C. App. 230, 243 S.E.2d 398 (1978); *Black v. Clark*, 36 N.C. App. 191, 243 S.E.2d 808 (1978); *State v. Johnson*, 38 N.C. App. 111, 247 S.E.2d 286 (1978).

Rule 13

Filing and Service of Briefs

(a) **Time for Filing and Service.** Within 20 days after the appeal is docketed in the appellate court, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. Within 20 days after appellant’s brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party shall pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court’s own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Drafting Committee Note

Sources and parallels in former rules or statutes: Sup. Ct. Rules 25, 26, 27, 27½, 28, 29 (and Ct. App. counterparts).

Commentary:

General. This Rule deals directly only with the filing and service of briefs in appeals from the trial courts. It does not apply to intra-appellate division appeals under Article III, which contains its own provisions on the subject. Administrative agency appeals under Art. IV incorporate the provisions of this Rule by reference. This Rule does not deal with the form, function, and content of briefs, a matter which App. R. 28 controls.

Subdivision (a) is self-explanatory as to operation. Freed from the "district call" mode of hearing appeals, this rule simply continues the open-ended timetable for taking the various steps in the appellate process.

Subdivision (b) is self-explanatory. For general background, see the Commentary to App. R. 12(c).

Subdivision (c) carries forward in minor restatement certain provisions of former Sup. Ct. Rules 28 and 29.

Applied in *In re Revocation of License to Operate Motor Vehicle of Church*, 29 N.C. App. 511, 224 S.E.2d 697 (1976).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14

Appeals of Right from Court of Appeals to Supreme Court Under G.S. § 7A-30

(a) Notice of Appeal; Filing and Service. Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right may be filed with or contained in the notice of appeal.

(b) Same; Content.

(1) Appeal Not Presenting Constitutional Question. In an appeal which is not asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken and shall state the basis upon which it is asserted that appeal lies of right under G.S. § 7A-30.

(2) Appeal Presenting Constitutional Question. In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall contain the elements specified in Rule 14(b)(1) and in addition shall specify the articles and sections of the Constitution asserted to be

involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) Record on Appeal.

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) Briefs.

(1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based solely upon the existence of a substantial constitutional question the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist. Within 15 days after the service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party shall pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Drafting Committee Note

Sources or parallels in former rules or statutes: Supp. Rules 3, 5, 6, 7, 8.

Commentary:

General. This Rule 14 and succeeding Rule 15 cover in general all matters covered by former Supplementary Rules 1-13. This rule deals comprehensively with appeals of right under G.S. § 7A-30, and Rule 15 with discretionary appeals upon certification either prior to or following Court of Appeals' determination. Various rules in *General Provisions* Article VI apply to different aspects of the practice covered

by these two rules: App. R. 25 (dismissal for failure to perfect appeal); App. R. 26 (filing and service); App. R. 27 (computation and extension of time); App. R. 28 (function and content of briefs); App. R. 29 (calendar and call of appeals); App. R. 30 (oral argument); App. R. 31 (petition for rehearing); App. R. 37 (motion practice).

Subdivision (a) carries forward the time limit provided in former Supp. R. 3(a). The provisions for tolling by filing of a petition for rehearing and for tolling as to all other parties by filing a

notice of appeal by any party are new. Reciprocally, a notice of appeal or petition for discretionary review waives the rehearing option. App. R. 31(f). Note changed language "issuance of mandate" rather than "certificate of the clerk," to conform to the language of App. R. 32.

Subdivision (b) carries forward in unchanged substance the provisions of former Supp. R. 3(b).

Note that the only requirement as to substantive content of the notice of appeal is for the jurisdictional basis (in fact and law) for the asserted right to have Supreme Court review. It is not necessary in the notice of appeal to specify the whole range of questions which the appellant is entitled to present and intends to present if the appeal is entertained as properly based jurisdictionally. This is the office of the new brief required by subdivision (d)(1) of this rule to be filed in the Supreme Court. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence the appeal of right . . . is based," but extends to all questions "properly presented in the new briefs." See, so holding independently of a direct rule provision, *State v. Colson*, 274 N.C. 297, at 305 (1968) (appeal properly grounded in substantial constitutional question entitles to review on any other questions properly presented); but cf. *State v. Horn*, 285 N.C. 82, at 84 (1974) (dictum apparently *contra*; but Court indicated consideration nevertheless of the non-constitutional questions). The Rules herein cited, by clearly codifying the rule announced in *Colson*, remove any question on the point.

See, for an illustrative form of notice of appeal under this Rule, Committee Form 3.

Subdivision (c). The first sentence of subsection (1) carries forward unchanged in substance the provisions of former Supp. R. 5(a). The last sentence of this subsection is new and preserves to the Supreme Court the opportunity

to enforce these Rules independently of any prior acceptance by the Court of Appeals of a record on appeal. Subsection (2) is designed to conform to developed clerical practice under the former Supplementary Rules, and makes the transmission and docketing of records on appeal within the appellate division purely a ministerial function of the respective clerks. Details of the manner of procurement or reproduction of copies of the record and of the number and recipients of distribution remain to administrative direction of the court.

Subdivision (d). Subsection (1) alters the timetable for filing and service provided by the former Supplementary Rules: from 10 days to 20 days from date of docketing the record for the appellate's brief; from 20 days after docketing of the record to 15 days after service of appellant's brief, for the appellee's brief. The provision for filing but single copies of briefs for reproduction of copies by the clerk conforms to the practice described in the Commentary to Rule 13(b) for filing briefs in appeals from the trial courts. While this subsection deals basically only with filing and service requirements, leaving function and content to App. R. 28, which covers that subject as to *all* briefs, there is the important requirement in this subsection that the briefs filed under this Rule 14 in the Supreme Court shall be *new*. This removes the option given by former Supp. R. 8 to file a brief which merely *supplements* the Court of Appeals brief. The reason for requiring new briefs in all cases is developed in detail in the Commentary to App. R. 28(d). That subdivision permits incorporation in whole or in part of all or portions of the *argument* section of the briefs filed in the Court of Appeals into the argument section of the *new* brief required by this subdivision.

Subsection (2) carries forward unchanged in substance a comparable provision in former Supp. RR. 28 and 29.

Editor's Note. — The amendment adopted Jan. 31, 1977, added the proviso to the first sentence of subdivision (d)(1).

Applied in *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206 (1977).

Rule 15

Discretionary Review on Certification by Supreme Court Under G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, or the Commissioner of Insurance may

only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15, Art. 22.

(b) Same; Filing and Service. A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for review. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) Same; Content. The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. § 7A-31 for discretionary review. The petition shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) Response. A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response.

(e) Certification by Supreme Court; How Determined and Ordered.

(1) On Petition of a Party. The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) On Initiative of the Court. The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) Orders: Filing and Service. Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) Record on Appeal.

(1) Composition. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) Filing; Copies. When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner, to cover the costs thereof.

(g) Filing and Service of Briefs.

(1) Cases Certified Before Determination by Court of Appeals. When a case is certified for review by the Supreme Court before being determined by the

Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 20 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 15 days after a copy of appellant's brief is served upon him.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by that Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms *appellant* and *appellee* have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, *appellant* means a party who appealed from the trial tribunal; *appellee*, a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, *appellant* means the party aggrieved by the determination of the Court of Appeals; *appellee*, the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 15.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. Rules 1, 2, 4, 5, 6, 7, 8, 11, 13.

Commentary:

General. For coverage of this rule in conjunction with that of App. R. 14, see General

Commentary to the latter. Note that this Rule 15 deliberately avoids use of the term “certiorari” to describe the procedure by which under the jurisdictional statute, G.S. § 7A-31, the Supreme Court exercises its discretionary power to review cases originally docketed for review in the Court of Appeals. Instead, the terms “certification,” “certify for review,” “petition for discretionary review,” are used to conform directly to the statutory language and the procedure therein described, and to distinguish this procedure from that for review by the extraordinary writ of certiorari, which is dealt with in App. R. 21.

Subdivision (a) lays the basis for the rule’s coverage of both by-pass and post-determination review procedures.

Subdivision (b) carries forward the time limits for petition for discretionary review provided in former Supp. R. 1 (by-pass) and Supp. R. 2 (post-determination). For commentary on the provision for tolling by filing a petition for rehearing in the Court of Appeals and the reciprocal effect of waiver of rehearing by petition for discretionary review, see Commentary to App. R. 14(a).

Subdivision (c). The provision for accompanying a post-determination petition with a copy of the Court of Appeals’ opinion is from former Supp. R. 5(b). The other provisions supplant and serve the function of those provisions of former Supp. Rules 1 and 2 which borrowed certiorari writ practice by reference to former Sup. Ct. R. 34.

Note that the rule requires only that the petition contain a statement of the jurisdictional basis (in fact and law) for the review being sought. It is *not* necessary in the petition to specify the whole range of questions which the petitioner is entitled to present and intends to present if the case is certified for review. That is the office of the new brief required by subdivision (g)(2) of this rule to be filed upon certification. By Rule 16(a) the scope of Supreme Court review is not limited to “those questions upon whose existence . . . the discretionary review is based,” but extends to all questions then “properly presented in the new briefs.”

See, for an illustrative form of a petition for discretionary review under this Rule, Committee Form 4.

Subdivision (d). Former Supp. Rules 1 and 2 in effect borrowed the certiorari *writ* practice sketched in former Sup. Ct. R. 34 for the discretionary review practice which is the subject of this new Rule 15. One of the former rule’s features was a provision for response by other parties to such a petition. This subdivision carries this forward by direct statement.

Subdivision (e). Subsections (1) and (2) state directly what was merely implicit in former Supplementary Rules, which did not speak directly to the decision process on petitions for discretionary review. Subsection (3) carries forward, unchanged in substance but with some elaboration, the provision of former Supp. Rules 6, 8, and 13.

Subdivision (f). Subsection (1), first sentence, carries forward, unchanged in substance, the provisions of former Supp. R. 5(a). The second sentence is new. See Commentary to comparable App. R. 14(c)(1).

Subsection (2) conforms to developed clerical practice not directly stated in former Supplementary Rules. See Commentary to App. R. 14(c)(2).

Subdivision (g). Subsection (1) carries forward, unchanged in substance, the provisions of former Supp. RR. 6 and 11 controlling the filing and service of briefs in “by-pass” review situations whether on party or court initiative.

Subsection (2) carries forward the essential provisions of former Supp. RR. 7 and 8 controlling the filing and service of briefs in cases involving review by the Supreme Court of Court of Appeals determinations, but with two significant alterations from former practice: 1) The timetable for filing and service is changed: as to the appellant’s brief, from 10 days to 25 days after docketing in the Supreme Court (see App. R. 15(e)(3) for time when docketing occurs); as to the appellee’s brief, from 20 days after docketing in the Supreme Court to 15 days after service of appellant’s brief. 2) The option to file *supplementary* briefs is removed; filing of *new* briefs is required. See Commentary to App. R. 14(d)(1).

Subsection (3) covers the filing of briefs in both by-pass and post-determination review cases. In by-pass review situations the responsibility for filing in the Supreme Court will depend upon whether the party has already filed his brief in the Court of Appeals before the case is certified for review. App. R. 15(g)(1). In post-determination situations filing will always be by the party and will be of the *new* brief required by App. R. 15(g)(2). This subdivision (3) is simply saying that in whatever situation only one copy of that brief need be filed in the Supreme Court to satisfy the *filing* requirement.

Subsection (4) carries forward, unchanged in substance, a comparable provision in Supp. RR. 28 and 29.

Subdivision (h) carries forward the comparable provision in former Supp. R. 2, and is drawn ultimately from G.S. § 7A-31.

Subdivision (i). From former Supp. R. 4.

Editor's Note. — All but one section of Chapter 15, Article 22, referred to in subsection (a) of this rule, has been repealed. For present provisions as to post-trial relief, see § 15A-1411 et seq.

Rule 16

Scope of Review of Decisions of Court of Appeals

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. No assignments or cross-assignments of error to the decision of the Court of Appeals are required as the basis for the presentation of questions for review by the Supreme Court. A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals. A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

(b) **Appellant, Appellee Defined.** As used in this Rule 16, the terms *appellant* and *appellee* have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, *appellant* means the party aggrieved by the decision of the Court of Appeals; *appellee*, the opposing party. Provided, that in its order of certification the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 16.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 2 (only first sentence of subdivision (a)).

Subdivision (a) is designed to give hitherto lacking detailed guidance to counsel in dealing with the special problems posed by second review in a two-tiered appellate court system. The first sentence is drawn directly from the last sentence of former Supp. R. 2, and expresses the critical feature of second review by the higher court: that it is the decision of the first reviewing court which is under direct review. The rest of the subdivision is new and lays down certain corollaries to this root principle. These take into account the following points: 1) that the parties

may or may not have changed positions as appellant and appellee on the second review; 2) that, following App. RR. 10(d) and 28(c), questions may properly be presented for review at both levels by both appellants and appellees; 3) that the *potential* scope of review by the higher court is limited only by the questions properly presented on first review in the first reviewing court, and not by the scope or basis of the latter's decision. See *State v. Colson*, 274 N.C. 295 (1968); 4) that within this *potential* scope of second review, the *actual* scope should be limited to those precise questions chosen and identified by the parties in their briefs as those for review by the higher court. Other rules

which operate in important conjunction with this Rule 16 are cross-referred to emphasize the interrelation: 1) App. Rules 14(d)(1) and 15(g)(2) both force the conscious choice of precise questions for higher court review by their requirements that in both appeals of right and in discretionary appeals, both parties shall file *new* briefs in the Supreme Court; 2) App. R. 28, dealing with the function and content of briefs, requires both parties to state the questions being presented for review by the court to which appeal is taken, and in subdivision (c) spells out the procedure by which appellees in the Court of Appeals may in their briefs present questions

for review. See Commentary to App. Rules 10(d) and 28(c). Notice that neither party is required to make assignments of error or cross-assignments of error with respect to the Court of Appeals decision.

Subdivision (b), by its forced definition of terms, permits a single set of descriptive "appellant" and "appellee" to be used in designating the parties in discretionary review cases as well as appeals of right, and within the discretionary review category, to both party-initiative and court-initiative situations. It is drawn from former Sup. Ct. R. 4.

The potential scope of review by the Supreme Court is limited by the questions properly presented for first review in the Court of Appeals. The attempt to smuggle in new questions is not approved. *Falls Sales Co. v. Board of Transp.*, 292 N.C. 437, 233 S.E.2d 569 (1977).

Review for Error of Law in Court of Appeals Only. — After there has been a determination by the Court of Appeals, review by the Supreme Court, whether by appeal of right or by

discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before the Supreme Court for review. *Falls Sales Co. v. Board of Transp.*, 292 N.C. 437, 233 S.E.2d 569 (1977).

Applied in *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978); *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978).

Rule 17

Appeal Bond In Appeals Under G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court, in civil cases the party who takes appeal shall, upon filing the record on appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of \$200, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 18.

Commentary:

This rule simply carries forward, in slightly re-stated form, the provisions of former Supp. R. 18. It does state explicitly, in the second sentence of subdivision (b), what is only implied in the former Supplementary Rule — that upon certification for review of a Court of Appeals determination on initiative of the Supreme Court, no appeal bond is required. Notice that these provisions for securing costs in intra-Appellate Division appeals are independent of those of App. Rules 6 and 7 for securing the costs of initial appeal from the trial courts, except to the extent that security there given stands good on the by-pass appeal under subdivision (c).

Editor's Note. — The amendment effective July 1, 1978, adopted June 19, 1978, inserted "in civil cases" near the beginning of subsection (a) and inserted "civil" preceding "case" in the first sentence of subsection (b) and near the beginning of subsection (c).

The order which amended this rule and repealed Rule 7 provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO THE COURT OF APPEALS

Rule 18

Taking Appeal; Record on Appeal — Composition and Settlement

(a) **General.** Appeals of right under G.S. § 7A-29 to the Court of Appeals from the Utilities Commission, the Industrial Commission, the Commissioner of Insurance, and the Disciplinary Hearing Commission of the North Carolina State Bar (hereinafter "agencies" or "agency") shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Rule 18, Rule 19, and Rule 20.

(b) **Time and Method for Taking Appeals.** The times and methods for taking appeals from the agencies shall be as provided respectively in G.S. § 62-90(a) for appeals from the Utilities Commission; G.S. § 97-86 for appeals from the Industrial Commission and G.S. § 58-9.5(1) and (2) for appeals from the Commissioner of Insurance.

The time and methods for taking appeals from the Disciplinary Hearing Commission of the North Carolina State Bar are: Either party to the proceeding, within 30 days after receipt of a copy of the order of the Commission, which is to be sent by registered or certified mail, may appeal from the decision of the Commission to the Court of Appeals for alleged errors of law under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals in ordinary civil actions.

In case of an appeal from the decision of the Commission to the Court of Appeals, the appeal shall operate as a supersedeas; and any discipline imposed by the Commission shall be stayed pending determination of the appeal.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any of the agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a copy of stipulation of counsel showing the same; (iii) copies of all other notices, pleadings, petitions or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination; (iv) a copy of any findings of fact and conclusions of law and of the order, award, decision, or other determination of the agency from which appeal was taken; (v) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for understanding of all errors assigned; (vii) copies of such other papers filed and transcripts of such other proceedings had before the agency or any of its individual commissioners, deputies, or divisions as are necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the agency, and of all appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled for certification and filing in the Court of Appeals by any of the following methods:

(1) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal constitute a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant may, within 30 days after appeal is taken, file in the office of the agency and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 15 days after service of the proposed record on appeal upon him, an appellee may file in the main office of the agency and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference, Referee, or Agency Head; Failure to Request Settlement.** If any appellee timely files objections, amendments, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the Chairman of the Utilities Commission or the Commissioner of Insurance to convene a conference to attempt settlement of the record on appeal in appeals from their respective agencies, or the Chairman of the Industrial Commission to settle the record on appeal in appeals from that agency, or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar to settle the record on appeal in appeals from that agency. A copy of such request shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately

have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed any appellee makes request in the same manner.

Within 20 days after receipt of a request for agency-supervised conference in appeals from the Utilities Commission and the Commissioner of Insurance, the agency head shall convene a conference of all parties to the appeal by written notice. At the conference the agency head or his delegate shall attempt to accomplish a settlement of the record on appeal by agreement of the parties. If no such agreement is accomplished, the agency head shall forthwith request the Chief Judge of the Court of Appeals to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of the reference order.

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar shall by written notice to counsel for all parties set a place and a time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order.

(e) Certification of Record on Appeal. Within 10 days after the record on appeal has been settled by any of the procedures provided in Rule 18(d), the appellant shall present the items constituting the record on appeal to the agency head for certification. The agency head or his delegate shall forthwith inspect the items presented and if they be found true copies and transcriptions, so certify them, noting the date of certification on the appropriate docket of the agency.

(f) Further Procedures. Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 62-90(a) (Utilities Commission appeals); 97-86 (Industrial Commission appeals); 58-9.5(1) and (2) (Commissioner of Insurance appeals).

Commentary.

General. The statutes referred to in the sources and parallels noted above have provided details of the appellate procedure for appeals from the three state agencies indicated directly to the Court of Appeals. In conjunction with promulgation of these rules, those provisions have been stripped from the respective statutes by amendment, and are now incorporated in this Rule 18 as a practically comprehensive procedure for appeals from all three agencies. That procedure is uniform except in one respect, spelled out in subsection (3) of subdivision (d), concerning the mode of settlement of the record on appeal where the parties fail to agree. See the Commentary to that provision. The prescribed procedure substantially parallels, as did the statutory provisions, that provided for appeals from the trial courts. There are a few deviations, which are specifically identified in the Rule and App. R. 20 as matter retained in the governing statutes.

Subdivision (a) "borrows" in general the appellate procedure prescribed in these rules for

appeals from the trial courts, except as that procedure is specifically spelled out in this Rule 18, or is retained in statutory prescriptions which are in turn identified in this and the succeeding two rules which make up this Article IV. This Rule 18 takes the procedure, including that left to statutory prescription, generally down to the point of certification of the record on appeal. At that point subdivision (f) specifically defers to the subsequent procedures provided in these rules for appeals from the trial courts.

Subdivision (b) defers to the retained statutory provisions because of their possible jurisdictional significance.

Subdivision (c) follows the format of App. R. 9(b) in specifying for agency appeals the items constituting the record on appeal. The items identified either duplicate or are appropriate analogues to comparable items specified for civil appeals.

Subdivision (d) parallels, practically identically, the procedure for settling records on appeal from the trial courts as specified in App. R. 11. There is one variation among the three agencies, which is dealt with in subsection (3): the mode of "judicial" settlement in the event of failure to settle by party agreement or exchange. Here, taking into account the possible involvement of the agency itself in appeals from

the Utilities Commission and the Commissioner of Insurance, settlement is to be attempted first by an agency-supervised conference, and if this fails, by a referee appointed by the Chief Judge of the Court of Appeals. In Industrial Commission appeals, wherein the agency is not potentially a party in interest, settlement is to be by the agency head in the manner of the judge of a trial court. There is also a related variation in the timetable for settling records in agency appeals from that provided for trial court appeals: the agency head has 20 days rather than 15 days to call a settlement conference. Cf. App. R. 11(c).

Subdivision (e) parallels the comparable procedure for certification of trial court records. Cf. App. R. 11(e), substituting the agency head or his delegate as the certifying authority.

Subdivision (f) borrows all necessary further procedures — which would include those provided in App. R. 12 for filing the record on appeal and in App. R. 13 for filing and serving briefs — from the trial court appeal procedures.

While this subdivision does not specifically refer to them, the procedures laid down in the rules found in Art. VI, "General Provisions," governing such matters as filing and service, extensions of time, content of briefs, etc., are by their terms also applicable, as appropriate, to these agency appeals.

Editor's Note. — The amendment adopted June 21, 1977, added the Disciplinary Hearing Commission of the North Carolina State Bar to the list of agencies in subsection (a), added the second and third paragraphs of subsection (b), added the language beginning "or the Chairman of the Hearing Committee" at the end of the first sentence of the first paragraph of subdivision (d)(3) and inserted "or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar" near the beginning of the third paragraph of subdivision (d)(3).

Applied in *State v. Williams*, 40 N.C. App. 178, 252 S.E.2d 245 (1979).

Rule 19

Parties to Appeal From Agencies

(a) **From Utilities Commission.** The complainant in the original complaint before the Commission, each of the other parties to the proceeding before the Commission, and the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

(b) **From Industrial Commission.** The claimant before the Commission and the employer against whom claim is made and any other parties to the proceeding before the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

(c) **From Commissioner of Insurance.** The complainant in the original complaint before the Commissioner, each of the other parties to the proceeding, and the Commissioner may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

(d) **From the Disciplinary Hearing Commission of the North Carolina State Bar.** The complainant in the original complaint before the Disciplinary Hearing Commission, each of the other parties to the proceeding, the Chairman of the Hearing Committee or the Chairman of the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 62-90(a) (Utilities Commission); 97-86 (Industrial Commission); 58-9.5(1) and (2) (Commissioner of Insurance).

Commentary.

These provisions are simply borrowed from the statutes which have hitherto completely

controlled appeals from these three agencies. They are included in these rules because of the rather unique alignments of parties in agency appeals, including the agencies themselves in Utilities Commission and Commissioner of Insurance appeals. Cf. Commentary to App. R. 18(d).

Editor's Note. — The amendment adopted June 21, 1977, added subsection (d).
Disciplinary Hearing Commission. — Under the statutory method of disciplining attorneys "any party," including the attorney in question and the State bar, may appeal from a decision of the Disciplinary Hearing Commission. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Rule 20

Miscellaneous Provisions of Law Governing in
Agency Appeals

Specific provisions of law pertaining to stays pending appeals from any agency to the Court of Appeals, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.
Commentary.
This rule is necessitated by the fact that as to the matters specified statutory procedures peculiar to the three agencies and differing from parallel procedures provided in these rules continue to control. This disclaimer of rule authority avoids any possible conflict. The matters specified are deemed to pertain so closely to legislative control of these quasi-judicial bodies, including their financing and the limits of the powers delegated to them by the legislature vis-a-vis those of the legislature and the courts (i.e. scope of judicial review, and permissible mandates of the reviewing court) that they must continue to be controlled by statute rather than appellate rule-making authority.

ARTICLE V. EXTRAORDINARY WRITS

Rule 21

Certiorari

(a) **General.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right to appeal from an interlocutory order exists; or by the Supreme Court in appropriate circumstances to permit review of the judgments and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action.
(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.
(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34.

Commentary.

General. This rule builds upon and attempts to clarify the certiorari writ practice provisions of former Sup. Ct. R. 34. As indicated in the General Commentary to App. R. 15 dealing with discretionary review by the Supreme Court under G.S. § 7A-31, that practice is by these Rules clearly differentiated in form and in terms from the extraordinary writ practice described in this Rule 21. The former Supplementary Rules in effect “borrowed” the Sup. Ct. R. 34 certiorari writ practice as the procedure by which determinations were made by the Supreme Court to “certify” Court of Appeals determination for discretionary review under G.S. § 7A-31. Former Supp. R. 2(a)(3). In these rules, App. R. 15 prescribes internally a “certification” practice for such cases; and this Rule 21 is confined in terms and in form to the traditional extraordinary writ function of classic certiorari as a means of review outside the regular appeal route.

Subdivision (a) establishes that certiorari may lie from either appellate court to permit review of trial tribunal judgments when ordinary appeal right has been lost or does not exist because of the interlocutory character of the judgment. (“Trial tribunal” includes, per App. R. 1, the district and superior courts, and the three state agencies from which appeals lie to the Court of Appeals.) Further, that certiorari may lie from the Supreme Court to review Court of Appeals determinations when the right to regular appeal has been lost. Specification of which of the appellate courts may properly issue the writ to trial tribunals is left to subdivision (b). And the practice within either court is left to subdivision (c).

Subdivision (b) points to the correct appellate

court to petition for the writ in any case. It is that court to which either party *might* have a right to appeal from any final judgment of the tribunal sought to be reviewed. This means that the petition must always be addressed to the Court of Appeals in any case before the three state agencies of Article IV, and in any case before the trial courts except a criminal case wherein a sentence of death or life imprisonment is possible or has been entered. In the latter case the petition must be addressed to the Supreme Court. In any case in the Court of Appeals wherein the writ may be sought, it must obviously by this Rule be sought in the Supreme Court. In cases where the writ is denied by the Court of Appeals, the petitioner must seek review of that determination under the general appeal provisions of App. R. 14 (of right) or App. R. 15 (discretionary review) as the case may dictate. Only if the right to seek regular review by either of these routes has been lost by failure to take timely action could a petitioner refused certiorari in the Court of Appeals seek review of that refusal by a second petition to the Supreme Court.

Subdivision (c), following traditional practice in the use of this discretionary writ, provides no specific time limit for filing the petition. The question of timeliness in a particular case is to be determined as a part of the general question of its propriety as an extraordinary mode of review. The other provisions of this subdivision elaborate upon the more sketchy descriptions of the practice contained in former Sup. Ct. R. 34.

Subdivision (d) carries forward in restated form, but unchanged in substance, the provisions of former Sup. Ct. R. 34.

See Committee Form 8, “Petition for Writ of Certiorari Under Rule 21”, for an illustrative form.

Habeas Corpus Proceedings for Prisoners Under Sentence of Death or Life Imprisonment. — By analogy, subdivision (b) of this Rule and § 7A-27(a), and repealed

§ 15-180.2 were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life

imprisonment. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

Quoted in *Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979).

Cited in *Black v. Clark*, 36 N.C. App. 191, 243 S.E.2d 808 (1978).

Rule 22

Mandamus and Prohibition

(a) Petition for Writ; to Which Appellate Court Addressed. Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) Same; Filing and Service; Content. The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) Response; Determination by Court. Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary:

General. Presumably because of the essentially liberal and flexible formula for determining appealability of interlocutory orders found in G.S. § 1-277, an extensive use of mandamus and prohibition to review such orders has not developed in our practice. Nevertheless, there are interlocutory orders from which appeal of right is held not to lie even under this formula. And in particular cases there may be need for immediate review of such orders to permit the affected party effectively to continue, such as discovery orders denying access to material deemed essential by the party. See, e.g., *Carolina Overall Corp. v. East Carolina Linen Supply, Inc.*, 1 N.C. App. 318 (1968) for such a possibility. Here mandamus and prohibition have traditionally provided an available means of

review, particularly in systems such as the federal with fairly rigid "final judgment" constraints on appealability, and may be useful in our practice under such occasional circumstances as those above suggested. On occasion it would appear that certiorari has been used in circumstances where mandamus or prohibition would have been more appropriate (though they come eventually to the same thing, it must be admitted). See, e.g., *Brice v. Salvage Co.*, 249 N.C. 74 (1958).

The functions of mandamus and prohibition are similar and may well be interchangeable. (In jurisdictions where they have widespread usage it is common to petition for a "writ of mandamus or, alternatively, prohibition"). However, they have traditionally served different functions and are strictly appropriate for different situations. Mandamus lies most appropriately to compel a judicial action erroneously refused, or to correct

judicial action erroneously taken, or to compel the exercise of judicial discretionary action when the taking of any action has been refused. Prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought.

Mandamus by appellate writ under this rule is to be distinguished from that procedure (now abolished) by which under former G.S. §§ 1-511 et seq. a “civil action in the nature of mandamus” was available as an original proceeding in the superior courts to compel the performance of purely ministerial duty by a public official. That office is now performed by a straightforward civil action for injunctive relief against the official.

Subdivision (a). As indicated, the petition for mandamus and prohibition is technically against the judicial officer sought to be controlled in respect of judicial action taken or refused, and is

in form an original proceeding against him. On the rare occasions that prohibition has been used in our practice, in recent times at least, it seems clear that this traditional form has not been observed. See, e.g., *State of N.C. ex rel. Payne v. Ramsey*, 262 N.C. 757 (1964). The main feature of the traditional form is the opportunity it provides for the affected judicial officer to participate directly. This feature may be important when the conduct drawn in question is alleged to contain elements of abuse of power, or to reflect a recurring pattern in similar cases. On most occasions, however, this will not be the case, and the judicial officer will simply leave the matter to be contested between the true parties in interest.

Subdivisions (b) and (c) set out the essentials of the writ practice, and conform generally to the traditional patterns of motion practice with or without direct participation of the judicial officer as technical respondent.

Cited in *State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau*, 291 N.C. 55, 229 S.E.2d 268 (1976).

Rule 23

Supersedeas

(a) Pending Review of Trial Tribunal Judgments and Orders.

(1) **Application — When Appropriate.** Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Same — How and to Which Appellate Court Made.** Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions.** Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when an appeal of right has been taken, or a petition for discretionary review or for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition: Filing and Service; Content.** The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral arguments will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay.** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34(2).
Commentary.

General. This rule builds upon the bare reference to supersedeas writ practice found in former Sup. Ct. R. 34(1). It provides in these Rules the sole grounds and procedures by which an appellate court may stay enforcement or execution of the judgment of a trial tribunal pending the appellate court's review of that judgment by appeal or on application for certiorari, mandamus, or prohibition. Supersedeas by appellate court writ is a different procedure than that provided in App. R. 8 for stay by trial court order. The two rules are interrelated by appropriate cross-references.

Subdivision (a) deals only with supersedeas to stay enforcement of trial tribunal judgments. Supersedeas to stay Court of Appeals judgments is dealt with in following subdivision (b). This subdivision (a) lays down two conditions to seeking stay of enforcement of trial tribunal judgments: 1) the case must either be on appeal or the petitioner must be seeking review by one

of the extraordinary writs. The procedure is thus ancillary and may not be undertaken except in conjunction with appellate review of the judgment in question; 2) there must have been a prior unsuccessful attempt to obtain or to hold an effective stay of the judgment in the trial tribunal. The procedures by which this may be attempted at that level are spelled out in App. R. 8. This latter condition may be avoided only upon an alternative one — that under the circumstances, seeking to obtain stay at the trial court level would simply be impracticable.

Subsection (2) directs the petition in all cases except death and life imprisonment cases to the Court of Appeals. Thus, a party may not appeal to the Court of Appeals and seek initially to obtain stay by supersedeas from the Supreme Court. Upon denial of the petition by the Court of Appeals, the petitioner could then turn to the Supreme Court with a petition for supersedeas to that court (rather than seeking review of that denial by appeal or discretionary review in the Supreme Court).

Subdivision (b) deals with the much more rare practice for seeking supersedeas from the Supreme Court in respect of Court of Appeals' determinations. Here again, as in petitions for supersedeas directed to trial tribunal judgments, it is required that the petition be in conjunction with an attempt to obtain review of the judgment in question by the Supreme Court. But, unlike supersedeas running to trial tribunals, there is no requirement here that stay must first have been sought in the Court of Appeals.

Subdivision (c) expands upon the procedure provided in former Sup. Ct. R. 34(2). See Committee Form 9, "Petition for Writ of Supersedeas."

Subdivision (d) expands upon the procedure provided in former Sup. Ct. R. 34(2)(3).

Subdivision (e) had no counterpart in former rules. It provides for relief comparable to that of the t.r.o. in injunction practice, for stay pending the court's determination of the base petition. By the last sentence, this may in extreme cases be issued ex parte.

Cited in North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976).

Rule 24

Form of Papers: Copies

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

any of the writs authorized by App. Rules 21, 22, or 23.

Commentary.

General. This applies to the practice to obtain

ARTICLE VI. GENERAL PROVISIONS

Rule 25

Dismissal for Failure to Comply with Rules

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise to perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions made under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by

that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N. C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, 287.1; Ct. App. Rules 5, 17, 18, 50.

Commentary. This rule states a blanket authority in the appropriate courts to dismiss cases on appeal for failure to take any timely action in the appellate process, from serving proposed case on appeal to filing the record on appeal. The consequence of failing thereafter to file briefs within permitted times is dealt with separately by App. Rules 13(c) (appeals from trial tribunals), 14(d)(2) (appeals of right from Court of Appeals) and 15(g)(3) (discretionary appeals from Court of Appeals). Former practice with respect to the proper court to entertain motions to dismiss is varied slightly in this rule. Under former Sup. Ct. R. 17 a motion to dismiss for failure to make timely filing of a record on appeal was made to the appellate court in

conjunction with a motion to docket the appeal. This Rule 25 simply directs the motion for any failure to take timely action to the court wherein the case is then docketed. In the instance of a record not yet filed in the appellate court with time therefor elapsed, this now means the trial tribunal. The rule also makes plain that which is merely implied in former statutes and rules: that upon motion to dismiss the court may for good cause excuse an untimely action or nonaction and permit delayed action rather than dismissing. This replaces the more complicated procedure for "redocketing" or "reinstatement" upon such a showing which was provided by former Sup. Ct. RR. 17, 18. The provisions of App. R. 27(c) for extensions of time or for the taking of action after time expired are related in an obvious way to these provisions for dismissal upon initiative of the opposing party.

Editor's Note. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

The court lacks discretion under this rule to permit the notice of appeal to be served after

the expiration of 10 days following the entry of judgment. *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Rule 26

Filing and Service

- (a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing.
- (b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.
- (c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined on the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

General. This rule deals comprehensively with the procedures for filing and serving papers in any context where these are required by these rules. The attempt in general is to conform to parallel requirements in the N. C. Rules of Civil Procedure governing filing and service of papers in the trial courts.

Subdivision (a). The key point here is the provision that although filing may be accomplished by mailing as well as by hand delivery to the appropriate clerk's office, its timeliness is measured in either case by the time of receipt in the clerk's office.

Subdivisions (b) (c) (d). Paralleling the provisions of N.C.R.Civ.P. 5, these subdivisions provide practical, expeditious modes of accomplishing and proving required service of papers. Of particular importance is the provision

in subdivision (b) making service by mail complete upon due deposit in the mails, a provision which expedites the requirement in subdivision (b) that papers be served "at or before" filing. Of importance here is the provision of App. R. 27(b) which gives any person so served by mail an additional 3 days to take required action following service.

Subdivisions (e) (f). These subdivisions are other instances of the attempt to accommodate the rules to the case involving multiple parties, and are designed to expedite conformance with the party-service requirements in the situations described. Cf. N.C.R.Civ.P. 5(c). The specification "proceeding separately" accommodates to the alternative possibility that "numerous" parties may have voluntarily joined under App. R. 5, in which case by force of App. R. 26(e) service upon one automatically is service upon all.

Cited in *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Rule 27

Computation and Extension of Time

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the

computation. A half holiday shall be considered as other days and not a holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; by Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal prescribed by these rules or by law.

A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken. All other motions for extensions of time are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. No extension of time shall be granted by the trial tribunal which, if fully used, would preclude filing the appeal within 150 days from the taking of the appeal. If the appellate division extends the 150-day filing period, any subsequent motion for any extension of time shall be made to the appellate court where the case is to be docketed. Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state; provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard. Such motions may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a) and (b): None. Subd. (c): G.S. § 1-282, Ct. App. Rules 5, 17, 18, 50.

Commentary.

Subdivisions (a) and (b). These subdivisions parallel for appellate procedure the provisions of N.C.R.Civ.P. 6(a) and (e) for trial court procedures.

Subdivision (c). As in the corollary provisions of App. R. 25 governing the procedure for dismissals for untimely action or for nonaction, this subdivision lays down a blanket authority in the appropriate courts to extend any of the critical time intervals provided in these rules, with the important exception of the times for taking appeal. The general rule stated is that such motions are made to that court wherein the action is currently docketed. An important exception to this is the provision that the outer time limit of 150 days from taking appeal to file the record on appeal provided by App. Rule 13(a) may only be extended by the appellate court to

which appeal has been taken. This parallels the provision formerly in Ct. App. R. 5 that the 90-day outer limit for "docketing" a record on appeal might be extended by the appellate court.

The final paragraph of this subdivision is new and authorizes extensions of time by the trial tribunals to be made ex parte, and without prior notice, but with the requirement of post-order notice to all parties of any extension granted. While this is a liberalization of former practice, it is thought justified, in view of the matter involved, to expedite action. App. R. 36, cross-referred as the source for identifying trial division judges empowered to grant extensions of time, also liberalizes the practice by opening this to a wider range of such judges than was formerly provided by now repealed G.S. § 1-282, which limited this to "the trial judge." Again, the idea is that given the matter involved, expedition of action is the most important consideration.

Editor's Note. — The amendment adopted March 7, 1978, added the third and fourth sentences of the second paragraph of subsection (c).

The amendment adopted October 4, 1978, effective January 1, 1979, added the proviso to the first sentence of the last paragraph of subsection (c).

The time for taking an appeal may not be enlarged by the appellate courts. *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Applied in *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Cited in *In re Allen*, 31 N.C. App. 597, 230 S.E.2d 423 (1976).

Rule 28

Briefs; Function and Content

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the following order:

(1) A statement of the questions presented for review.

(2) A concise statement of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court. It should additionally contain a short, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review.

(3) An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

(4) A short conclusion stating the precise relief sought.

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain an argument and a conclusion in the form provided in Rule 28(b)(3) and (4) for an appellant's brief. It need contain no statement of the questions presented nor of the case, unless the appellee disagrees with the appellant's statements and desires to make a restatement of either, or unless the appellee desires to present questions in addition to those stated by the appellant. Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant. Within 20 days after service upon him of an appellee's brief presenting such questions, an appellant may file

and serve upon all parties a reply brief limited to those additional questions presented in the appellee's brief.

(d) Incorporation of Court of Appeals Argument into Supreme Court Brief by Reference. All or any portions of the argument section of a brief filed in the Court of Appeals may be incorporated by reference into the argument section of a new brief required to be filed in the Supreme Court by Rules 14(d)(1) or 15(g)(2).

(e) References in Briefs to the Record. References in the briefs to exceptions and assignments of error shall be by their numbers and to the pages of the printed record on appeal at which they appear. Every reference to an assignment of error should include a reference to the particular exception(s) pertinent to the point for which the reference is made. Reference to parts of the printed record on appeal shall be to the pages where the parts appear. Where reference to the printed record on appeal is made in support of a contention that there was insufficient evidence to support a verdict, finding, or order, the reference may be to those pages within which all the evidence is set out.

(f) Joinder of Multiple Parties in Briefs. Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) Additional Authorities. Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties prior to the oral argument. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

(h) Reply Briefs. Except for a reply brief filed under subdivision (c) of this Rule 28, or unless the court upon its own initiative orders a reply brief to be filed and served, none will be received or considered by the court.

(i) Amicus Curiae Briefs. A person may file an amicus curiae brief only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative. A person may apply for leave to file such a brief by motion filed with the clerk of the appellate court and served upon all parties within 5 days after the record on appeal is docketed in the appellate court. The brief shall be conditionally filed with the motion for leave. The motion shall identify the interest of the applicant and state the reasons why an amicus curiae brief is desirable. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument. The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Drafting Committee Note

Sources and parallels in current statutes and rules: Sup. Ct. Rules 27, 27½, 28, 29.
Commentary.

General. This Rule defines the function and prescribes the form and content of *all* briefs, whether on appeals from the trial tribunals, or from the Court of Appeals to the Supreme Court. It does not deal with filing and service requirements. These appear in App. RR. 13

(appeals from trial tribunals), 14(d) (appeals of right from Court of Appeals) and 15(g) (discretionary review of Court of Appeals).

Subdivision (a). This statement of function builds upon well-established practice developed over the years. Its basic point is that the questions formally presented to the court in the briefs define the actual scope of review which has been earlier narrowed by the choice of

exceptions to be brought forward in assignments of error. This serves to focus attention on the true function of assignments of error—that they serve primarily merely to alert the appellee to those portions of the record which will be relevant to consideration of the appellant's contentions on appeal. Since some of these may be abandoned, it is the questions presented in the briefs rather than the assignments of error which provide the court's direct source for consideration of error. In this light, the provisions of App. R. 10 which strip the assignment of error to a non-argumentative statement of the substance of the error suggested, with a mere reference to those exceptions set out in the body of the record upon which it is based, is justified. See Commentary to App. R. 10(c).

Subdivision (b) builds upon the more sparsely stated content requirements of former Sup. Ct. RR. 27, 27½, and 28. Subsection (2) attempts to formulate a clear standard of expectation as to the form and content of that element described as the "statement of the case." This element of the brief (confusedly denominated in many as the "statement of case on appeal") has been a frequent source of unhelpful prolixity and occasional abuse, as contested fact has been stated as established fact or in argumentative form. Against this tendency, the rule emphasizes a desire for conciseness, an outline of the essential nature of the case with its procedural history, and a nonargumentative statement of just so much undisputed factual background and context as will aid the court in its study of the briefs and records in light of the questions presented.

Subdivision (c). The most important provision in this subdivision is that which authorizes the formal presentation by appellees of questions for consideration by the court on a conditional basis. The conditional aspect is that in response to the appellant's brief the court will find error as assigned by the appellant. Two types of conditional questions are posited. The first must rest upon formal cross-assignment of error by the appellee, and this, per App. R. 10(d), may be based upon any error which is asserted by the appellee to have deprived him of an alternative basis for supporting his judgment. The other is already provided by N.C.R.Civ.P. 50(d) in its authorization for appellee presentation of the question (without any cross-assignment of error) whether a new trial should be awarded him as a matter of grace rather than giving judgment n.o.v. for the appellant where the court determines that the appellee's verdict is not supportable on the evidence. This provision is also important in its relationship to App. Rule 16 wherein the scope of Supreme Court review of Court of Appeals decisions is defined in terms of the questions properly raised by appellees as well as appellants in the Court of Appeals. The

Commentary to that rule should be read in conjunction with this.

Subdivision (d). This in an important adjunct to the requirement in Rules 14(d)(1) and 15(g)(2) that *new* briefs be filed for Supreme Court review of Court of Appeals determinations. The compelling reason for that requirement is to force a reconsideration and possibly a restatement of the questions to be presented on this second review. See Commentary to App. R. 16. Even when a party desires to present exactly the same set of questions presented to the Court of Appeals, their restatement in the new brief will not be unduly burdensome. But restating the entire argument advanced in support of the party's position on these questions could well be. Hence this provision allows all or portions of the *argument* section in a Court of Appeals brief to be incorporated by reference in a new Supreme Court brief. This brief must nevertheless contain a reformulation or restatement of the other required elements: questions presented; statement of case (which has changed by whatever action the Court of Appeals has taken); and relief sought (which will have changed most obviously if the parties are now reversed as appellant and appellee).

Subdivision (e) carries forward traditional practice for making references in the brief to particular items or portions of the record on appeal. The specification that reference is to be made to pages of the "printed" record refers to the "work copies" as prepared by the clerk pursuant to App. RR. 12(c), 13(b), 14(d)(1), 15(g)(3). These of course will bear different pagination than does the formal record on appeal filed by the appellant, and may indeed contain fewer items by stipulation of the parties under App. R. 12(c). This of course means that final references must await preparation by the clerk of these "printed" or "work" copies, but the time intervals between filing of the formal record and the deadline for filing briefs is adequate. App. R. 13(a).

Subdivision (f). If parties have formally joined on the appeal under App. R. 5, they will of course file joint briefs. This subdivision permits joinder on brief by parties not formally joined for all purposes on an appeal.

Subdivision (g) carries forward in slightly restated form a comparable provision in former Sup. Ct. R. 27.

Subdivision (h) had no counterpart in former rules, but expresses generally understood practice. The cross-reference is to that subdivision of this Rule which gives a right to an appellant to file a reply brief in any situation where an appellee has exercised the right to present "cross-questions," the reply brief being limited to these.

Subdivision (i) had no counterpart in former rules.

Under this Rule, appellate review is limited to the arguments upon which the parties rely in their briefs. *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976).

The proviso to App. R. 10(a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of this Rule that a question must be presented and argued in the brief in order to obtain appellate review of it. *State v. Brothers*, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

This rule requires that a question be presented and argued in the brief in order to obtain appellate review. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977).

Questions raised by assignments of error but not presented in party's brief are deemed abandoned. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

Under former Rule 28 (Rules of Practice in Court of Appeals), assignments of error not brought forward and argued in the brief are deemed abandoned. *State v. Robinson*, 26 N.C. App. 620, 216 S.E.2d 497 (1975).

The Court of Appeals will not "fish out" an appellate's exceptions which are not referred to by the proper printed page number. *Lee v. Capitol Tire Co.*, 40 N.C. App. 150, 252 S.E.2d 252 (1979).

The State is not required by section (c) to state the facts unless there is some disagreement. *State v. Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977).

Codefendant Deemed to Have Abandoned Assignment. — Where codefendants object to the introduction of evidence, but the assignment of error based on this exception is brought forward and discussed in the brief of only one of the codefendants, the assignment is deemed abandoned by the other codefendants. *State v. Cox*, 289 N.C. 414, 222 S.E.2d 246 (1976).

An exception to the trial judge's signing of the judgment upon verdict of guilty raises nothing for review under this rule. *State v. Womble*, 292 N.C. 455, 233 S.E.2d 534 (1977).

It is the better practice for the appellee's brief to use the same numbering system for the questions presented as the appellant's brief. *State v. Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977).

Question Not Raised at Trial or on Appeal May Not Be Attacked by Collateral Review. — Where the defendant in a prosecution for second-degree murder failed to raise at trial, on

direct appeal or in a subsequent petition for post-conviction relief, the question of the trial judge's alleged error in instructing the jury that the burden was on the defendant to disprove malice to reduce the killing to voluntary manslaughter and to prove that he killed in self-defense, the defendant could not seek collateral review of the alleged error. *State v. Locklear*, 39 N.C. App. 671, 251 S.E.2d 638, cert. denied, 296 N.C. 739, 251 S.E.2d 638 (1979) (decided under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina).

Applied in *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976); *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976); *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976); *State v. Cawthorne*, 290 N.C. 639, 227 S.E.2d 528 (1976); *State v. Duncan*, 290 N.C. 741, 228 S.E.2d 237 (1976); *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976); *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976); *State v. Greene*, 30 N.C. App. 507, 227 S.E.2d 154 (1976); *In re Salem*, 31 N.C. App. 57, 228 S.E.2d 649 (1976); *State v. Davis*, 31 N.C. App. 590, 230 S.E.2d 203 (1976); *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977); *State v. Manuel*, 291 N.C. 705, 231 S.E.2d 588 (1977); *Falls Sales Co. v. Board of Transp.*, 292 N.C. 437, 233 S.E.2d 569 (1977); *Community Bank v. McKenzie*, 32 N.C. App. 68, 230 S.E.2d 788 (1977); *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206 (1977); *State v. Musumeci*, 33 N.C. App. 88, 234 S.E.2d 31 (1977); *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977); *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977); *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977); *State v. Alston*, 293 N.C. 553, 238 S.E.2d 505 (1977); *State v. Lockett*, 33 N.C. App. 401, 235 S.E.2d 73 (1977); *State v. Tuttle*, 33 N.C. App. 465, 235 S.E.2d 412 (1977); *State v. Minshew*, 33 N.C. App. 593, 235 S.E.2d 866 (1977); *White v. Lawrence*, 33 N.C. App. 631, 236 S.E.2d 30 (1977); *Streeter v. Streeter*, 33 N.C. App. 679, 236 S.E.2d 185 (1977); *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978); *State v. Martin*, 294 N.C. 253, 240 S.E.2d 415 (1978); *Burkholder v. Coble*, 35 N.C. App. 127, 239 S.E.2d 852 (1978); *State v. Warren*, 35 N.C. App. 468, 241 S.E.2d 854 (1978); *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978); *State v. Saults*, 294 N.C. 722, 242 S.E.2d 801 (1978); *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978); *Smith v. State*, 36 N.C. App. 307, 244 S.E.2d 161 (1978); *State v. Burke*, 36 N.C. App. 577, 244 S.E.2d 477 (1978); *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978); *State v. Bailey*, 36 N.C. App. 728, 245 S.E.2d 97 (1978); *Siedlecki v. Powell*, 36 N.C. App. 690, 245 S.E.2d 417 (1978); *State v. Davis*, 37 N.C. App. 173, 245 S.E.2d 583 (1978); *Triplett v. Triplett*, 37 N.C. App. 283, 245 S.E.2d 812

(1978); *State v. Cox*, 37 N.C. App. 356, 246 S.E.2d 152 (1978); *Spencer v. Spencer*, 37 N.C. App. 481, 246 S.E.2d 805 (1978); *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978); *In re Robinson*, 39 N.C. App. 345, 250 S.E.2d 79 (1979); *State v. Henley*, 296 N.C. 547, 251 S.E.2d 463 (1979); *State v. Hopkins*, 296 N.C. 673, 252 S.E.2d 755 (1979); *Fungaroli v. Fungaroli*, 40 N.C. App. 397, 252 S.E.2d 849 (1979); *State v. Robinson*, 40 N.C. App. 514, 253 S.E.2d 311 (1979); *King v. Demo*, 40 N.C. App. 661, 253 S.E.2d 616 (1979); *State v. Jolly*, 297 N.C. 121, 254 S.E.2d 1 (1979); *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 254 S.E.2d 223 (1979); *State v. Hunt*, 297 N.C. 258, 254 S.E.2d 591 (1979).

Quoted in *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976); *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. Kessack*, 32 N.C. App. 536, 232 S.E.2d 859 (1977); *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

Cited in *State v. Hunt*, 289 N.C. 403, 222 S.E.2d 234 (1976); *State v. Coffey*, 289 N.C. 431, 222 S.E.2d 217 (1976); *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976); *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537 (1976); *State v.*

Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); *State v. Craft*, 32 N.C. App. 357, 232 S.E.2d 282 (1977); *State v. Willard*, 293 N.C. 394, 238 S.E.2d 509 (1977); *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977); *State v. Greene*, 34 N.C. App. 149, 237 S.E.2d 325 (1977); *State v. McWhorter*, 34 N.C. App. 462, 238 S.E.2d 639 (1977); *Murphy v. Murphy*, 34 N.C. App. 677, 239 S.E.2d 597 (1977); *State v. Thomas*, 35 N.C. App. 198, 241 S.E.2d 128 (1978); *Bridger v. Mangum*, 35 N.C. App. 569, 241 S.E.2d 726 (1978); *North Carolina Auto. Rate Administrative Office v. Ingram*, 35 N.C. App. 578, 242 S.E.2d 205 (1978); *Lineberry v. Wilson*, 36 N.C. 649, 244 S.E.2d 702 (1978); *Bank of N.C. v. Cranfill*, 37 N.C. App. 182, 245 S.E.2d 538 (1978); *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978); *Triplett v. Triplett*, 38 N.C. App. 364, 248 S.E.2d 69 (1978); *State v. Gosnell*, 38 N.C. App. 679, 248 S.E.2d 756 (1978); *State v. Rudolph*, 39 N.C. App. 293, 250 S.E.2d 318 (1979); *Reliance Ins. Co. v. North Carolina Nat'l Bank*, 39 N.C. App. 420, 250 S.E.2d 699 (1979); *Tanglewood Land Co. v. Wood*, 40 N.C. App. 133, 252 S.E.2d 546 (1979); *State v. Sealey*, 41 N.C. App. 175, 254 S.E.2d 238 (1979).

Rule 29

Terms and Sittings of Courts; Calendar for Hearings

(a) Terms and Sittings.

(1) **Supreme Court.** There shall be two terms of the Supreme Court each year—a Spring Term commencing on the first Tuesday in February and a Fall Term commencing on the first Tuesday in September. During the terms appeals will be calendared for hearing as provided in subdivision (b) of this rule, and will be heard in accordance with a schedule promulgated by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) Calendaring of Cases for Hearing.

Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal preemptory setting or otherwise to vary the normal calendar order. Except as advanced for preemptory setting on motion of a party or of the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. When a reply brief is allowed by rule or ordered by the Court, the appeal will be calendared or re-calendared for hearing at a time not less than 10 days after the time for filing the reply brief.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 1, 4, 5, 6, 7, 8, 9, 45; Ct. App. R. 1.

Commentary.

Subdivision (a) carries forward, with a minor modification to be noted, the provisions of former rules of both appellate courts regarding their respective terms and sittings.

Subsection (1) retains the Supreme Court's traditional Spring and Fall Terms of Court, from former Sup. Ct. R. 1. It abandons the stated hours for sitting during these terms which were provided in superseded Sup. Ct. R. 45. The last sentence substitutes for this scheduling procedure which does not specify particular hours of sitting.

Subsection (2) retains, from superseded Ct. App. R. 1, that Court's maintenance of a continuous term, with sittings of the panels for

hearings being controlled by administrative action of the Chief Judge in accordance with published schedules.

Subdivision (b) consummates abandonment of the "district call" mode of calendaring cases for hearing in both appellate courts. As indicated, cases are now calendared without regard to their districts of origin, and generally instead on the basis of their order of docketing. The provision in the fourth sentence for a minimum of 30 days between filing of appellant's brief and the hearing of argument gives a leeway of at least 10 days between the filing of appellee's brief and the oral argument in appeals from the trial tribunals, App. R. 13(a); and a minimum of 15 days between the filing of appellee's brief and the time of oral argument in appeals from the Court of Appeals, App. RR. 14(d)(1), and 15(g)(2).

Rule 30

Oral Argument

(a) Order and Content of Argument. The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) Time Allowed for Argument.

(1) In General. Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) Numerous Counsel. Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) Non-Appearance of Parties. If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) Submission on Written Briefs. By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) Decision of Appeal Without Publication of an Opinion.

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion on every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published,

would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

(f) Pre-Argument Review; Decision of Appeal Without Oral Argument.

(1) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule.

(2) If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 10, 15, 30.

Commentary.

Subdivision (a). The first sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(1). The second sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(2), in its requirement that appellant include a statement of the case in his opening argument. However, as appears in subdivision (b), this rule does not give him automatically an additional 10 minutes (over appellee's time) to devote to this. The last sentence of this subdivision (a) is new and its purpose is to encourage proper utilization of the oral argument as a complementary, not merely repetitive, device to the argument in written brief.

Subdivision (b) builds upon the less detailed provisions of former Sup. Ct. R. 30(2), (3), and (4) which controlled the allocation of times for arguments. As indicated in the Commentary to subdivision (a) the basic times allocated by the rule are varied to cut back the appellant's time to parity of 30 minutes with that given appellee.

If appellant considers that his duty to state the case justifies an extension in the particular case, he may request it. The specific identification of adverse interests between co-parties as a possible basis for extending the basic time of 30 minutes given to all of them simply recognizes that this is probably the most frequent basis upon which extensions may justly be sought. The penultimate sentence is drawn from former Sup. Ct. R. 30(4). The last sentence is new as a direct statement but has certainly been implicit in the practice under former rules.

Subsection (2) restates without substantive change the provisions of former Sup. Ct. R. 30(5).

Subdivision (c) supplants former Sup. Ct. R. 15 in dealing with the problem of non-appearance at oral argument. The former rule dealt more broadly with failures to "prosecute" in general, presumably including non-appearance at the hearing set for oral argument.

Subdivision (d) carries forward in restated form but without substantive change the provisions of former Sup. Ct. R. 10.

Editor's Note. — The amendment adopted May 3, 1976, added subsection (f).

The amendment adopted Dec. 18, 1975, added subsection (e).

The amendment adopted February 5, 1979 added subdivision (3) to subsection (e).

Rule 31**Petition for Rehearing**

(a) **Time for Filing; Content.** A petition for rehearing may be filed in a civil action within 20 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as the petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who, for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been of counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted, and if the court has ordered oral argument, shall give notice of the time set therefor, which time shall be not less than 30 days from the date of such notice. The case will be reconsidered solely upon the record on appeal, the petition to rehear, and new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 10 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 44.
Commentary.

General. Traditional practice in this relatively

seldom invoked procedure has been fairly complex and burdensome, featuring the requirement that a petition to be considered at all must be supported by the certificates of two

disinterested attorneys that each considers the court's decision in error, and the direction of the petition to specific (non-dissenting) members of the court rather than to the court itself, with these members then acting for the court in respect of the grant or denial of the petition. The first of these features is retained in this new rule; the latter is completely changed.

Subdivision (a) shortens the time for filing a petition from 40 days under former Sup. Ct. R. 44(1) to 20 days. It carries forward, in restated form but unchanged in substance, the provisions as to content and the attorney certificate requirement of former Sup. Ct. R. 44(2).

Subdivision (b) involves a complete change from the former practice by which the petition was addressed to specific members of the court who then determined for the court, and without further recourse to the court, whether the rehearing should be allowed. Under this subdivision (b) the petition is directed to the appropriate court. The manner in which the court will then determine whether to grant the rehearing is not spelled out and is left to administrative determination of the particular court.

Subdivision (c) accommodates to the new provision for court determination of the petition rather than specific member determination which is embodied in subdivision (b). The time for determination by the court after filing of the petition is the same 30 days provided in former Sup. Ct. R. 44(4) for determination by the court members to whom the petition was directed after it was delivered to them. The second sentence restates more explicitly the provisions in former Sup. Ct. R. 44(1), (5) for determination to grant or deny the petition solely on the basis of the petition, without oral argument or response from the other party. The provisions for allowance as to less than all points prayed is carried forward in restated form from former Sup. Ct. R. 44.

Subdivision (d) carries forward, in restated form but unchanged in substance, the provisions of former Sup. Ct. R. 44(5) as to the matter to be

considered by the court if rehearing is allowed, including the provision that oral argument will only be permitted by order of court. The provision for setting a time for oral argument if one is ordered is new. The times provided in the new rule for filing new briefs when rehearing is allowed is unchanged as to the petitioner (10 days from notice of grant) but changed as to the opposing party (from 20 days after grant of petition to 20 days after service upon him of petitioner's brief) from the provisions of former Sup. Ct. R. 44(5).

Subdivision (e) substantially changes the procedure for obtaining stay of execution of the trial court judgment upon filing of a petition for rehearing from that provided in former Sup. Ct. R. 44(7). Under the new rule, this is done at the trial court level pursuant to the provisions of App. R. 8, rather than by the Court members who under former Sup. Ct. R. 44 considered the petition.

Subdivision (f) is new, having no counterpart in former rules. It operates reciprocally with provisions of App. R. 14(a) and App. R. 15(b), which provide that the filing of a timely petition for rehearing tolls the running of the time to give notice of appeal or to petition for discretionary review from a Court of Appeals determination. The time for petitioning for rehearing is 20 days from issuance of mandate; that for giving notice of appeal or petitioning for discretionary review is 15 days from the same date. This means that if a party is to keep alive options for both rehearing and appellate review of Court of Appeals determinations, he must within the 15 days allowed to appeal or petition for discretionary review file a petition for rehearing. He loses any opportunity for possible rehearing if within the time given for appeal or discretionary review petition he takes either of the latter actions. His option to petition for rehearing, however, will continue to exist for 5 days after expiration of the time within which he might have appealed or petitioned for discretionary review if he failed or chose not to do either during that time.

Applied in *Siders v. Gibbs*, 31 N.C. App. 481, 229 S.E.2d 811 (1976).

Rule 32

Mandates of the Courts

(a) In General. Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The

mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) Time of Issuance. Unless a court orders otherwise, its clerk shall issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 38.

Commentary.

Subdivision (a) builds upon former Sup. Ct. R. 38, but with some alteration of the terminology traditionally employed to describe the formal action by which an appellate court's determination of an appeal is made operative. This action is most accurately described as being the issuance of the court's *mandate* to the court from which appeal was taken. The former rule, above cited, spoke of transmitting "certificates of the decisions" of the court or, alternatively, of ordering "an opinion certified down," and in general usage the court's action has come to be referred to as "certifying decisions" or "opinions." But the court itself has employed the more accurate and comprehensive terminology when called upon to analyze and interpret the significance of the action in a particular situation. See, e.g., the opinion in *D & W, Inc. v. City of Charlotte*, 268 N.C. 720 (1966). This rule

employs the terminology here suggested as the more accurate. The mandate *includes*, but is not solely a certified copy of the court's opinion or judgment. And in some cases, it may take the form of a direct order to the trial tribunal, as in *D & W v. City of Charlotte*, *supra*; or *Collins v. Simms*, 257 N.C. 1 (1962) (exact text of judgment mandated).

Subdivision (b). The time of issuance of a mandate has importance under these rules as the reference point for taking appeal of right from the Court of Appeals to the Supreme Court (App. R. 14(a)); for petitioning the Supreme Court to certify a Court of Appeals decision for discretionary review (App. R. 15(b)); and for petitioning either appellate court for rehearing (App. R. 44(a)). Accordingly it is important for counsel to be alerted to the ordinary course indicated in subdivision (b) by which issuance occurs 20 days after filing of the court's opinion with its clerk.

Rule 33

Attorneys

(a) Appearances. An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in oral argument.

(b) Agreements. Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 32, 33.

Commentary.

Subdivision (a) restates, in an attempt at clarification, the provisions of former Sup. Ct. R. 33.

Subdivision (b) restates, with only minor variation and no change of substance, the provisions of former Sup. Ct. R. 32.

Rule 34

Frivolous Appeals: Costs

If a court of the appellate division determines that an appeal has been taken frivolously and for purposes of delay, it may be dismissed at the cost of the appellant upon motion of the appellee or upon the court's own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 17(1).
Commentary.

This rule carries forward, in restated form but without change of substance, the provisions of former Sup. Ct. R. 17(1).

Rule 35

Costs

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) **Direction as to Costs in Mandate.** The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) **Costs of Appeal Taxable in Trial Tribunals.** Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) **Execution to Collect Costs in Appellate Courts.** Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a)-(c): None. Subd. (d): Sup. Ct. R. 43(2).

Commentary.

General. Former rules did not speak directly to standards or procedures by which the appellate courts should tax costs of appeal which by law were properly assessable by these courts. By statute, G.S. § 7A-11 (Supreme Court) and 7A-20(b) (Court of Appeals) both appellate courts have the authority to fix by rule the fees to be assessed against litigants for costs incurred in those courts. This is done by separate special rule outside the scope of these Rules.

Subdivision (a) lays down the basic standard by which, following traditional practice, those

costs properly assessable by the appellate court are taxed to the losing party.

Subdivision (b) repeats a provision also included in App. R. 32(a) "Mandates of the Courts."

Subdivision (c) takes into account the fact that some costs of appeal are assessable in the trial court, and can only be assessed after the final determination on appeal of the losing party who is to bear them. See G.S. § 6-33, 7A-304(b), 7A-305(5).

Subdivision (d) builds on former Sup. Ct. R. 43(2) in providing for direct execution to collect costs taxed by the appellate courts.

Rule 36

Trial Judges Authorized to Enter Orders Under These Rules

(a) When Particular Judge Not Specified by Rule. When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) Upon Death, Incapacity, or Absence of Particular Judge Authorized. When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

Subdivision (a). The only judicial action which under these Rules must be taken by a "particular" judge is that of settling the record on appeal. Per G.S. § 1-283 and App. R. 11(c), only the judge from whose judgment appeal is taken may settle the record. All other judicial actions permitted to be taken by trial judges under these rules, including dismissals for failure to perfect appeals under App. R. 25, and extensions of time to take action under App. R.

27(c), come under the provisions of this subdivision. This involves a change from former practice which permitted only the "trial judge" to extend the time within which "case on appeal" (now "proposed record on appeal") might be served.

Subdivision (b) is complementary to newly re-written G.S. § 1-283 which provides for the continued authority of the only judge authorized to settle a record on appeal despite the expiration of his term after appeal has been taken from his judgment.

Rule 37

Motions in Appellate Courts

(a) Time; Content of Motions; Response. An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion

is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination.** Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 36.

Commentary.

General. Motion practice in the appellate division is fairly limited. It extends to such matters as obtaining dismissals under App. R. 25; extensions of time under App. R. 27(c); peremptory settings for oral argument under App. R. 29(b); modification in the times allocated for oral argument under App. R. 30(b); additions or amendments to the record on appeal under App. R. 9(b)(6); and substitution of parties under App. R. 38. This Rule 37 builds upon and expands the rudimentary directions for motion practice found in former Sup. Ct. R. 36.

Subdivision (a) carries forward from former Sup. Ct. R. 36 the point that motions may be made down to the very time of oral argument, unless a specific time limit applies to the particular motion. This necessitates the

provision in the penultimate sentence of this subdivision which accommodates to the possibility that a motion may be filed within 10 days of argument so that the normal response time of 10 days cannot be given.

Subdivision (b) contains an accommodation to the occasional emergency situation requiring ex parte relief, or possibly to a situation created by extremely late filing of motion so that it is impracticable to await response if effective relief is to be given. The protection given the adverse party in such a situation by the penultimate sentence is like that available to parties subjected ex parte to t.r.o.'s who may move to dissolve. Given the modest forms of relief which may be obtained by motion practice in the appellate division, all interests are thought adequately protected by this provision. The last sentence, providing that determination is ordinarily without oral argument, is new.

Cited in *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

Rule 38

Substitution of Parties

(a) **Death of a Party.** No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) Substitution for Other Causes. If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) Public Officers; Death or Separation from Office. When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 37.

Commentary.

General. This rule deals with the situation created by the loss of legal capacity of a party by death or other occurrence at those stages of litigation after an appealable order or judgment has been entered for or against the erstwhile party. Former Sup. Ct. R. 37 dealt in limited fashion with the situation under the title "Abatement and Revivor." This treated only the death possibility. This new rule attempts to deal more clearly with the total situation.

Subdivision (a) deals only with the situation created by *death* of a party acting in an *individual* (as opposed to official) capacity. Substitution for such a party for other reasons than death is treated in subd. (b). The problem of substitution for parties acting in *official* capacities is treated in subd. (c). After stating the basic non-abatement principle in its lead sentence, subdivision (a) then deals successively with the different situations created by death of parties in two distinct time intervals. The first is treated in the first paragraph and is that interval between the taking of appeal and its final disposition. The distinction made as to the proper persons to be substituted depending upon whether the action is "real" or "personal" is dictated by such cases as *Paschal v. Autry*, 256 N.C. 166 (1962), which hold in a variety of contexts that in real actions the cause passes to successors in interest, not personal representatives, so that judgments only against the latter would not bind the former. The substitution procedure described applies

whether the deceased party was appellant or appellee. The last sentence of the first paragraph accommodates to the possibility that in a personal action, where the personal representative is the proper substitute party, none has been appointed. Here the opposing party, whether appellee or appellant, may invoke court intervention to provide a proper substitute. This provision is particularly necessary for appellants whose appeals simply cannot proceed until proper substitution for their deceased adversary is made.

The second paragraph deals with another possible time interval, and one which poses quite different problems. This is the time period after appealable judgment is entered but before appeal has been taken. Here it is necessary to differentiate between the deaths of potential appellants and of potential appellees. The first sentence deals with the death in this interval of a potential appellee. Here the aggrieved party may simply proceed to take appeal within the time limited, without first obtaining substitution. Under our procedure this problem could be posed (except in the most exceptional circumstance) only where the appellant had not taken appeal by oral notice, i.e. when he must both file and serve notice of appeal upon all other parties. This rule does not speak directly to the problem of affecting service in this situation upon the now deceased adverse party. A proper solution would seem to be to serve the party's attorney of record under App. R. 26(c), or if the action is a real action wherein successors in interest are readily ascertainable, upon them as the prospective substitute parties. After appeal

has been taken, substitution as described for the post-appeal interval must then be made. The other possibility, of death of the potential appellant during this interval, is handled by authorizing his attorney of record to take appeal, with substitution to follow. (The alternative of appeal by personal representative is unlikely to be available in view of the 10-day limit on taking appeal, but could of course be realized.)

Subdivision (b) simply borrows the procedures of subdivision (a) for substitution necessitated by any other cause than death of a party acting in an individual capacity.

Subdivision (c) is new, with no counterpart in former rules.

Cited in *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Rule 39

Duties of Clerks; When Offices Open

(a) **General Provisions.** The clerks of the courts of the appellate divisions shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Clerk's Docket Book, Judgment Docket and Minute Book.** There shall be maintained in the offices of the clerks of each of the courts of the appellate division (i) a docket book, (ii) a judgment docket, and (iii) a minute book.

(i) In the docket book the clerk shall enter all appeals, motions, petitions, and orders docketed or entered in the court.

(ii) In the judgment docket the clerk shall enter a brief memorandum of every final judgment or order of the court, show the party against whom costs are adjudicated, and identify each case by its title and its number in the docket book. The judgment docket shall be indexed and cross-indexed in alphabetical order to the name of all parties.

(iii) In the minute book the clerk shall enter a brief summary of the proceedings of the court in each appeal disposed of and a brief summary of all sittings and ceremonies of the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 39.
Commentary.

This rule is devoted to a description of those internal administrative and clerical operations of

the clerk's offices in the appellate division which it is considered should be known to counsel in their conduct of appellate practice.

Rule 40

Consolidation of Actions on Appeal

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by App. R. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 14.
Commentary.

This carries forward in restated form the provisions of former Sup. Ct. R. 14. That rule made no specific mention of the possibility that consolidation might be on either party or court initiative, but this was certainly implied. This

new rule makes more specific the general provision in the former rule regarding the role of parties and court respectively in setting the "course of argument." The provisions of App. R. 30(b) are obviously available to parties in consolidated appeals to move for enlargement of the basic times therein allocated as totals for each "side."

Rule 41

Title

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R. . . .," is also appropriate.

APPENDIX OF TABLES AND FORMS

TABLE I

SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON APPEAL IN CIVIL JURY CASE (per Rule 9(b)(4))

Note

Only those items below listed which are required by Rule 9(b)(1) in the particular case should be included. See Rule 9(b)(5) for sanctions against including unnecessary items. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b)(1)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(1)(ii)
4. Statement of record items showing jurisdiction, per Rule 9(b)(1)(iii)
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon
9. Pre-trial order
10. Plaintiff's evidence, with any evidentiary rulings assigned as error
11. Motion for directed verdict, with ruling thereon
12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(b)(1)(vi)
17. Verdict
18. Motion for judgment n.o.v., with ruling thereon
19. Judgment
20. Appeal entries, per Rule 9(b)(1)(ix)
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal

23. Clerk's certification of record on appeal
24. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE II

**SUGGESTED ORDER OF ARRANGEMENT OF RECORD
ON APPEAL IN APPEAL FROM SUPERIOR COURT
REVIEW OF ADMINISTRATIVE AGENCY**

Note

Only those items below listed which are required by Rule 9(b)(2) in the particular case should be listed. See Rule 9(b)(5) for sanctions against including unnecessary items. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b)(2)(i)
3. Statement of organization of superior court, per Rule 9(b)(2)(ii)
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(b)(2)(iii)
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all items from administrative proceeding filed for review in superior court, including evidence
8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(b)(2)(viii)
11. Assignments of error, with pertinent exceptions, per Rule 9(b)(2)(ix)
12. Entries showing settlement of record on appeal
13. Clerk's certification of record on appeal
14. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE III

**SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON
APPEAL IN CRIMINAL CASE (per Rule 9(b)(4))**

Note

Only those items below listed which are required by Rule 9(b)(3) in the particular case should be included. See Rule 9(b)(5) for sanctions against including unnecessary items. This listing is based on successive trials in both the District Court and the Superior Court, but is of course adaptable to trial only in the Superior Court by exclusion of the items indicated by an *. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b)(3)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(3)(ii)
4. Warrant
5. Judgment in district court*
6. Entries showing appeal to superior court*
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. State's evidence, with any evidentiary rulings assigned as error
10. Motions at close of state's evidence, with rulings thereon

11. Defendant's evidence, with any evidentiary rulings assigned as error
12. Motions at close of defendant's evidence, with rulings thereon
13. State's rebuttal evidence, with any evidentiary rulings assigned as error
14. Motions at close of all evidence, with rulings thereon
15. Court's instructions to jury, per Rules 9(b)(3)(vi), 10(b)(2)
16. Verdict
17. Motions after verdict, with rulings thereon
18. Judgment and order of commitment
19. Appeal entries
20. Assignments of error, with pertinent exceptions, per Rule 10
21. Entries showing settlement of record on appeal
22. Clerk's certification of record on appeal
23. Names, office addresses and telephone numbers of counsel for all parties to appeal

TABLE IV

TIMETABLE FOR APPEALS FROM SUPERIOR AND DISTRICT COURTS UNDER ARTICLE II

Note

All of the critical time intervals here outlined except that for taking appeal may be extended by order of the court. The time for filing record on appeal may be extended past 150 days from the date of taking appeal only by order of the appropriate appellate court. All other times may be extended by the court wherein the appeal is docketed at the time. App. R. 27(c). This timetable does not cover appeals under Articles III (within appellate division) and IV (direct review of administrative agencies).

Action	Time(Days)	From Date of	Rule Reference
Taking Appeal (civil)	10	entry of Judgment (unless tolled)	3(c)
Taking Appeal (criminal)	10	Last day of session (unless tolled)	4(a)(2)
Filing and serving proposed record on appeal	30	Taking appeal	11(b)
Filing and serving objections or proposed alternative record	15	Service of proposed record	11(c)
Requesting judicial settlement of record	10	Last day within which last appellee served could file objections, etc.	11(c)
Settlement of record by judge	15	Receipt by judge of request for settlement	11(c)
Certification of record by clerk	10	Record on appeal settled	11(e)

Action	Time(Days)	From Date of	Rule Reference
Filing record on appeal in appellate court	10	Certification by clerk (<i>but not more than 150 days from taking appeal</i>)	12(a)
Filing appellant's brief	20	Docketing appeal	12(b), 13(a)
Filing appellee's brief	20	Service of appellant's brief	13(a)
Oral argument	30 (usual minimum)	Filing appellant's brief	29

FORM 1

**NOTICE OF APPEAL TO THE COURT OF APPEALS FROM A
JUDGMENT OR ORDER OF A SUPERIOR COURT OR A
DISTRICT COURT**

Note

Appropriate in all appeals of right from district or superior courts, except appeals from criminal judgments imposing sentences of death or of imprisonment for life. G.S. § 7A-27.

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
..... COUNTY COURT DIVISION

A. B., PLAINTIFF

V.

C. D., DEFENDANT

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

(trial court

case number)

NOTICE OF APPEAL

Defendant C.D. gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) (describing it).

(S)

....., 19.....

(address)

Attorney for C.D., Defendant

FORM 2

NOTICE OF APPEAL TO THE SUPREME COURT FROM A
JUDGMENT OF THE SUPERIOR COURT WHICH
INCLUDES A SENTENCE OF DEATH OR
IMPRISONMENT FOR LIFE

(Caption as in Form 1)

THE STATE OF NORTH
CAROLINA
V.
A. B., DEFENDANT

(trial court
case number)
NOTICE OF APPEAL

Defendant A.B. gives notice of appeal to the Supreme Court of North Carolina from the judgment (describing it).

(S)
....., 19.
.....
(address)
Attorney for A.B., Defendant

FORM 3

NOTICE OF APPEAL TO THE SUPREME COURT FROM A
JUDGMENT OF THE COURT OF APPEALS

Note

Appropriate in all appeals taken as of right from the Court of Appeals to the Supreme Court under G.S. § 7A-30. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review by certification may be included at the option of the party appealing. It may also be filed separately. See Form 4.

GENERAL COURT OF JUSTICE STATE OF NORTH
CAROLINA IN THE COURT OF APPEALS

A. B., PLAINTIFF
V.
C. D., DEFENDANT
(or)

(Court of Appeals
case number)
NOTICE OF APPEAL

THE STATE OF NORTH CAROLINA
V.
C. D., DEFENDANT

C.D., defendant, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describing it) which judgment (directly involves (a) substantial question(s) arising under Article, Section of the Constitution of the (United States) (State of North Carolina), in that it violates rights secured thereunder to the appellant by (here set out with particularity the way in which it is contended the constitutional rights have been violated)); or (was rendered with a dissent by Judge); or (was entered upon review of a decision of the North Carolina Utilities Commission in a general rate-making case).

(S)
....., 19.
.....
(address)
Attorney for C.D., Defendant

FORM 4

PETITION TO SUPREME COURT FOR DISCRETIONARY
REVIEW OF COURT OF APPEALS JUDGMENT
UNDER G.S. § 7A-31

Note

For filing either alone or as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right under G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case. The petition for discretionary review may also be included as an alternative within the Notice of Appeal. App. R. 14(a).

(Caption as in Form 3)

A. B., PLAINTIFF

V.

C. D., DEFENDANT

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

(Court of Appeals

case number)

PETITION FOR

DISCRETIONARY REVIEW

UNDER G.S. § 7A-31

C.D., defendant, hereby petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals [describing it] on the basis that [here set out the facts relied upon as constituting the grounds for discretionary review provided in G.S. § 7A-31.]

(S)

....., 19.....

(address)

Attorney for C.D., Defendant

FORM 5

APPEAL ENTRIES

Note

Appropriate as a ready means of providing in composite form for the record on appeal: 1) the entry required by App. Rule 9(b) showing appeal duly taken by oral notice under App. Rule 3(a)(1) or 4(a)(1); 2) judicial approval of the undertaking on appeal required by App. Rules 6 or 7; and 3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c). These entries of record may also be made separately. Where appeal is taken by filing and serving written notice, a copy of the notice with filing date and proof of service is appropriate as the record entry required. Per Tables I, II, and III in the Appendix of Tables and Forms, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken. The judge's signature, while not technically required, is traditional, and serves as authentication of the substance of the entries.

Defendant gave due notice of appeal to the Court of Appeals. Appeal bond in the sum of \$ adjudged to be sufficient. Defendant is allowed days in which to serve proposed record on appeal, and plaintiff is allowed days thereafter within which to serve objections or a proposed alternative record on appeal.

This day of, 19
 (S)
 Judge Presiding

FORM 6

EXCEPTIONS SET OUT IN RECORD ON APPEAL

A. Examples related to evidentiary rulings**1. Evidence admitted**

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection overruled.

Exception No. 7.

A. The name of E. F.

2. Evidence excluded

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection sustained.

(Witness would have testified: "The name of E. F.")

Exception No. 8.

B. To ruling on motion for directed verdict

At the close of all the evidence the defendant renewed his motion for directed verdict on the stated grounds that the plaintiff's evidence established as a matter of law his contributory negligence.

Motion denied.

Exception No. 9.

C. To refusal of court to submit issue tendered by defendant

Issues tendered by the defendant:

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

The court refused to submit issue No. 2.

Exception No. 10.

D. Examples related to judge's instructions to jury**1. Instruction erroneously given**

[Enclose in brackets portion of instructions to which exception is directed, followed by entry:]

Exception No. 11.

2. Law not explained, as required by N.C.R.Civ.P. 51

[Entry to be made at end of instructions given by court:]

The court failed to instruct the jury on the doctrine of last clear chance.
 Exception No. 12.

3. Law not applied to evidence, as required by N.C.R.Civ.P. 51

[Entry to be made at end of instructions given by court.]

The court failed in instructing the jury to apply the doctrine of last clear chance to plaintiff's evidence, Record pp. 80-90.

Exception No. 13.

FORM 7

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant, on the grounds [that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed] [or other appropriately stated grounds].

Exception No. 1, R p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the grounds that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

Exception No. 2, R p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the grounds that on the record before the court, good cause for the examination was shown.

Exception No. 3, R p. 10.

4. The court's denial of defendant's motion for summary judgment; on the grounds that there was no genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

Exception No. 4, R p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E. F. R pp. 29, 30; on the grounds that the testimony was hearsay.

Exception No. 7, R p. 29.

Exception No. 8, R p. 30.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence; on the grounds that plaintiff's evidence as a matter of law established his contributory negligence.

Exception No. 8, R p. 45.

3. The court's instructions to the jury, R pp. 50-51, explaining the doctrine of last clear chance; on the grounds that the doctrine was not correctly explained.

Exception No. 10, R p. 51.

4. The court's instructions to the jury, R pp. 53-54, applying the doctrine of sudden emergency to the evidence; on the grounds that the evidence referred to by the court did not support application of the doctrine.

Exception No. 11, R p. 54.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence; on the grounds that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

Exception No. 9, R p. 80.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence; on the grounds that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

Exception No. 1, R p. 20.

2. The court's Finding of Fact No. 10; on the grounds that there was insufficient evidence to support it.
Exception No. 2, R p. 25.
3. The court's Conclusion of Law No. 3; on the grounds that there are no findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.
Exception No. 3, R p. 27.

FORM 8

PETITION FOR WRIT OF CERTIORARI UNDER RULE 21

GENERAL COURT OF JUSTICE STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF

V.

C. D., DEFENDANT

(trial tribunal case number)

PETITION FOR WRIT OF CERTIORARI

To the Honorable Court of Appeals of North Carolina:

A.B., plaintiff, respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N. C. Rules of Appellate Procedure to review the [judgment] [order] [decree] of the Honorable E.F., Judge of the Superior [District] Court, dated, 19. . . . [dismissing plaintiff's action] or [entered on a jury verdict for defendant] or [denying plaintiff's motion for physical examination of defendant] etc.; and in support of this petition shows the following:

Facts

[Here set out factual background necessary for understanding basis of petition: e.g. failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.] [If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.]

Reasons Why Writ Should Issue

[Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.]

Attachments

Attached to this petition for consideration by the Court are certified copies of the [judgment] [order] [decree] sought to be reviewed, and [here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.]

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the Superior Court of County to permit review of the [judgment] [order] [decree] above specified, upon errors to be assigned by petitioner in a record on appeal constituted in accordance with the rules of this Court; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, ... , 19.....

Attorney for Petitioner

(Verification by petitioner or counsel)

FORM 9

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23

GENERAL COURT OF JUSTICE STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF (trial court case number)

V.

C. D., DEFENDANT PETITION FOR WRIT OF SUPERSEDEAS

To the Honorable Court of Appeals of North Carolina:

C. D., defendant in the above-titled action, respectfully petitions this Court to issue its writ of supersedeas to stay [execution] [enforcement] of the [judgment] [order] [decree] of the Honorable E. F., Judge of the Superior [District] Court, dated , 19....., pending review by this Court of said [judgment] [order] [decree] which [awarded damages in the sum of] [enjoined defendant from proceeding with construction of a dwelling described in the decree] etc.; and in support of this petition shows the following:

Facts

[Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g. trial judge has vacated the entry upon finding security deposited under G.S. § inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.]

Reasons Why Writ Should Issue

[Here set out factual and legal argument for justice of issuing writ: e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.]

Attachments

Attached to this petition for consideration by the court are certified copies of the [judgment] [order] [decree] sought to be stayed and [here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition].

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the Superior [District] Court of County staying [execution] [enforcement] of its [judgment] [order] [decree] above specified, pending issuance of the mandate of this Court following its review and determination of the [appeal now pending] [review by extraordinary writ] in the cause; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, ... 19.
.....
Attorney for Petitioner

(Verification by petitioner or counsel)

Note

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as a part of it, or separately, the petitioner may petition for a temporary stay of execution or enforcement pending the court's ruling on the petition for supersedeas. The following form is illustrative of such a petition for temporary stay order either included in the main petition as part of it or filed separately.

Petition for Temporary Stay

Petitioner applies to the Court for an order temporarily staying [execution] [enforcement] of the [judgment] [order] [decree] which is the subject of [this] [the accompanying] petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this application the petitioner shows that [here set out legal and factual argument for justice of such a temporary stay order: e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas].

(3) ORDER TRANSFERRING CERTAIN CASES FROM THE COURT OF APPEALS TO THE SUPREME COURT

(Rescinded as of November 1, 1971.)

(4) RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA

(Superseded as of July 1, 1975.)

Editor's Note. — These rules are superseded 13, 1975, and effective with respect to appeals in which notice of appeal was given on or after July 1, 1975. See Appendix I (2A).

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule

3. Continuances.

1. Philosophy of General Rules of Practice.

Applied in *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975).

2. Calendaring of Civil Cases.

Cited in *Green v. Eure*, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

3. Continuances.

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.

At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority.

Editor's Note. — The amendment adopted Feb. 13, 1973, deleted "Federal Court" following "Appellate Courts," in the second paragraph.

The granting of a continuance is within the discretion of the trial court, and its exercise will not be reviewed in the absence of manifest abuse of discretion. *Jenkins v. Jenkins*, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Where a motion for continuance is based on a right guaranteed by the Constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325 (1976), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L.Ed.2d 1211 (1976).

Error and Prejudice Must Be Shown. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325 (1976), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L.Ed.2d 1211 (1976).

Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. *Jenkins v. Jenkins*, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

6. Motions in Civil Actions.

Rule Number Necessary. — The trial judge should decline to rule upon motions which did not contain the rule number under which the movant is proceeding. *Lehrer v. Edgecombe Mfg. Co.*, 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Except When Defense of Insufficiency of Service of Process Asserted in Responsive Pleading. — Although worded as a motion, the defense of insufficiency of service of process was asserted in defendant's responsive pleading;

therefore, the rule requiring that a movant state the rule number under which he is proceeding was inapplicable, and failure of defendant to so state did not constitute waiver of his defense of invalid service of process. *Williams v. Hartis*, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

A motion which did not comply with the first paragraph of this rule was not totally defective since the directive of this rule of practice has the salutary purpose of ensuring that the court and the parties are aware of the grounds upon which

the movant is relying, the court's order in the case indicated that the judge was fully aware of the basis for the motion. *Wood v. Wood*, 297 N.C. 1, 252 S.E.2d 799 (1979).

Applied in *Long v. Coble*, 11 N.C. App. 624, 182 S.E.2d 234 (1971); *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E.2d 292 (1971); *Finley v. Finley*, 15 N.C. App. 681, 190 S.E.2d 660 (1972); *Neff v. Queen City Coach Co.*, 16 N.C. App. 466, 192 S.E.2d 587 (1972); *Smith v. Smith*, 17 N.C. App. 416, 194 S.E.2d 568 (1973); *Hamm v. Texaco, Inc.*, 17 N.C. App. 451, 194 S.E.2d 560 (1973);

Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); *Sherman v. Myers*, 29 N.C. App. 29, 222 S.E.2d 749 (1976).

Stated in *Don's Plumbing Co. v. Union Supply Co.*, 11 N.C. App. 662, 182 S.E.2d 219 (1971); *Mull v. Mull*, 13 N.C. App. 154, 185 S.E.2d 14 (1971); *Clouse v. Chairtown Motors, Inc.*, 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Cited in *Lattimore v. Powell*, 15 N.C. App. 522, 190 S.E.2d 288 (1972); *Hoglen v. James*, 38 N.C. App. 728, 248 S.E.2d 901 (1978).

8. Discovery.

Cross Reference. — As to sequence and timing of discovery, see § 1A-1, Rule 26(d).

Cited in *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978).

9. Call of Docket.

Defendant May Not Make Opening Statement Personally. — The defendant, while retaining the services of his court-appointed

counsel was not entitled to make an opening statement in *propria persona*. *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978).

10. Opening and Concluding Arguments.

Trial Judge Controls Sequence of Argument. — The time and sequence of argument of a case to the jury is controlled by the trial judge under the authority of this rule. *State v. Andrews*, 12 N.C. App. 421, 184 S.E.2d 69 (1971), appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 407 U.S. 922, 92 S. Ct. 2467, 32 L.Ed.2d 807 (1972).

And He May Rule at Close of Evidence. — The trial judge is not required to rule upon the sequence of the argument prior to the closing of the evidence. *State v. Andrews*, 12 N.C. App. 421, 184 S.E.2d 69 (1971), appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 407 U.S. 922, 92 S. Ct. 2467, 32 L.Ed.2d 807 (1972).

When there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

The trial court properly allowed the State to close the argument where defendant called a witness and examined him but did not glean helpful information from the witness because the witness refused to incriminate himself. *State v. Curtis*, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

Applied in *State v. Brown*, 13 N.C. App. 261, 185 S.E.2d 471 (1971).

Quoted in *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970); *State v. Baker*, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

11. Examination of Witnesses.

Discretion of Trial Judge as to Change of Counsel. — This rule clearly leaves it to the discretion of the trial court to permit a change of counsel if a lengthy examination is imminent.

State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

16. Withdrawal of Appearance.

Attorney-Client Relationship Dissolved at Any Time. — As between the attorney and his client, the relationship may, in good faith, be dissolved at any time. *High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc.*, 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977).

But Withdrawal from Litigation Must Be Justified. — The attorney may not be released

from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation. *High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc.*, 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977).

Appendix II. Rules of Practice in United States District Courts

United States District Court for the Middle District of North Carolina

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RULE

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I. General Rules**Rule 2.****ATTORNEYS****(b) Eligibility and Admission.**

(1) Any person who has been admitted to practice and is in good standing before the Supreme Court of North Carolina, and who is a resident of the State of North Carolina, is eligible for admission to the bar of this court.

(2) Eligible attorneys may be admitted to practice in this court by the court or by the full-time United States magistrate upon oral motion made by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

I do solemnly swear [affirm] that I have been admitted to practice before the Supreme Court of North Carolina, and that I am a member in good standing of that court; that I am a resident of the State of North Carolina; that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court uprightly and according to law, SO HELP ME GOD.

[SUCH BE MY SOLEMN AFFIRMATION.]

(c) **Fee.** The fee for admission to the bar of this court shall be \$10.00 payable to the clerk at the time of admission.

(d) Litigants Must Be Represented by Member of the Bar of This Court; Special Admissions.

(1) Litigants in civil and criminal actions and parties in bankruptcy proceedings, except governmental agencies and parties appearing *pro se*, must be represented by at least one member of the bar of this court, who shall state his name, mailing address and telephone number on each pleading. The service of all pleadings and notices permitted by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure shall be sufficient if served upon such attorney.

(2) Any person who is a member in good standing of the bar of the Supreme Court of the United States, or the bar of the highest court of any state in the United States, or the District of Columbia, shall be permitted to appear in a particular case in association with a member of the bar of this court.

(3) All pleadings presented to the clerk for filing, except by attorneys representing governmental agencies or parties appearing *pro se*, shall be rejected unless signed by at least one attorney who is a member of the bar of this court.

(f) Disbarment and Discipline.

(1) The standards of conduct of the members of the bar of this court shall be those standards prescribed by the canons of professional ethics of the American Bar Association and the canons of ethics of the North Carolina State Bar as they are now written and as they are hereafter modified or amended.

(2) Upon notice and hearing, any member of the bar of this court may, for good cause shown, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper. Whenever any member of the bar of this court has been disbarred from practice by either the appellate or trial division of the General Court of Justice, the North Carolina State Bar, or as otherwise provided by North Carolina General Statutes § 84-28, and such disbarment has become final, such member shall be disbarred forthwith from practice in this court, without notice or a hearing, upon the filing in this court of a certified copy of the final order of disbarment.

(3) Any attorney who before his admission to the bar of this court, or during his disbarment or suspension, exercises any of the privileges of the members of the bar of this court, or pretends to be entitled to do so, shall be guilty of contempt of court and subject to appropriate punishment therefor.

(g) Public Discussion of Litigation by Attorneys.

(1) *Release of Information by Attorneys.* It is the duty of the lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(2) *Same: Pending Investigation.* With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is under way, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(3) *Same: From Arrest.* From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer or

law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

(i) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(ii) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(iii) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(iv) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(v) The possibility of a plea of guilty to the offense charged or a lesser offense;

(vi) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(4) *Same: Matters of Record.* The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(5) *Same: During Trial.* During the trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication, except that the lawyer or law firm may quote from or refer without comment to public records of the court in the case.

(6) *Same: After Trial.* After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

(7) *Same: More Restrictive Rules.* Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

(8) *Same: Civil Actions.* A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public

records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

- (i) Evidence regarding the occurrence or transaction involved;
- (ii) The character, credibility, or criminal record of a party, witness, or prospective witness;
- (iii) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such;
- (iv) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule;
- (v) Any other matter reasonably likely to interfere with a fair trial of the action.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "may" for "shall," inserted "by the Court or by the full-time United States magistrate" and deleted "in open court" in the first sentence of subsection (b)(2), added present subsection (1) of section (f) and redesignated former subsections (1) and (2) of section (f) as (2) and (3), inserted the references to law firms throughout section (g) and made conforming changes so as to make that section applicable to law firms as well as attorneys, substituted "which a reasonable person would expect to be disseminated by means of public communication" for "for dissemination by any means of public communication" in subsections (1), (2), (3), (5) and (6) of section (g) and added subsection (8) of

section (g). The amendment also inserted "or associated with" near the beginning of subsection (2) of section (g).

The amendment adopted Nov. 8, 1973, increased the fee in section (c) from \$2.00 to \$10.00.

The amendment adopted March 14, 1975, substituted "Litigants in civil and criminal actions and parties in bankruptcy proceedings" for "Every litigant in civil and criminal actions" at the beginning of the first sentence of subsection (d)(1) and "mailing" for "office" preceding "address" near the end of that sentence.

Only the sections changed by the amendments are set out.

Rule 3.

COURT SCHEDULE AND CONDUCT OF BUSINESS

(c) Court in Continuous Session. The court shall be in continuous session in all divisions of the district, and all civil matters are deemed to be in an open status and subject to call at any time upon reasonable notice to the interested parties.

(d) Place of Holding Court; Time for Opening. Regular sessions of court, motion days, pre-trial conferences, and other court business, will be conducted in the courtroom located in the United States Post Office Building in division headquarters, unless otherwise directed. Court shall commence at 9:30 A.M. unless otherwise announced.

(g) Preparation of Trial Calendars. All pending criminal cases are calendared for trial at each regular criminal session of court as a matter of course. Trial date in civil cases will be announced by the court, if known, at the time of the final pre-trial conference.

(h) Release of Information by Courthouse Personnel. All courthouse personnel, including, among others, the United States marshal and his deputies, the Clerk of Court and his deputies, bailiffs, and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a case that is not part of the public records of the court. This proscription applies to the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "civil matters" for "matters, criminal and civil, not reached at regular sessions of court" and deleted "before the next regular session of court" following "any time" in section (c), corrected an error in punctuation in section (d), rewrote the second sentence of section (g) and deleted "pending criminal" preceding "case" near the end of the first sentence of section (h).

The amendment adopted Aug. 2, 1973, deleted the former second sentence of section (d), which provided that on opening day of regular sessions court should commence at 10 A.M., and deleted "On all other days" at the beginning of the present second sentence of section (d).

As the rest of the rule was not changed by the amendment, only sections (c), (d), (g) and (h) are set out.

Rule 4.

NATURALIZATION

Petitions for naturalization will be considered and acted upon, and appropriate ceremonies conducted in connection therewith, at Greensboro, North Carolina, on Fridays after the third Mondays in March, July and October, beginning at 2:00 P.M., unless otherwise ordered by the court. The court may, in its discretion, at other times, consider and act upon petitions for naturalization by members of the armed services, and seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "third Monday in May and November" for "first Monday in June and December" in the first sentence and inserted "appropriate patriotic" in the former second sentence.

The amendment adopted Jan. 12, 1973, substituted "North Carolina, on Fridays after the third Mondays in March, July and October, beginning at two P.M." for "on Friday after the third Monday in May and November of each year" in the first sentence.

The amendment adopted March 14, 1975, deleted "regularly" preceding "considered" near the beginning of the first sentence, added "unless otherwise ordered by the court" at the end of the first sentence and deleted the former second sentence, which provided for a committee to arrange for and conduct appropriate patriotic ceremonies in connection with naturalization proceedings.

Rule 6.

BRIEFS

(a) **Service.** Every brief required by these rules or an order of the court shall be served upon opposing parties or their counsel before it is presented to the clerk, and the brief shall clearly indicate the time and method of service. Briefs shall not become a part of the record in the case nor be considered to be a part of the "original papers" within the meaning of those words as used in Local Rule 10.

(c) **Citation of Cases.** Cases cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations of this rule [underscore names of parties]:

(1) State Court citations:

(a) Court of Appeals:

Atkinson v. Wilkerson, 10 N.C. App. 643, 179 S.E.2d 872 (1971).

(b) The Supreme Court:

Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

- (2) District Court citations:
 - (a) Published:
First National Bank of Catawba County v. Wachovia Bank & Trust Co., N.A., 325 F. Supp. 523 (M.D.N.C. 1971).
 - (b) Not published:
Wise v. Richardson, No. C-191-S-70 (M.D.N.C., Aug. 11, 1971).
- (3) Circuit Court of Appeals:
 - (a) Published decisions:
Mullins v. Oakley, 437 F.2d 1217 (4th Cir. 1971).
 - (b) Decisions not published:
Brown v. Hirst, No. 71-1291 (4th Cir., June 8, 1971).
Cason v. State of North Carolina, mem. dec., No. 13,535 (4th Cir., July 14, 1970).
Smith v. Jones, Misc. No. 15,356 (4th Cir., Aug. 10, 1971).
- (4) United States Supreme Court citations:
McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).
- (5) If a petition for certiorari was filed in the United States Supreme Court, disposition of the case in the Supreme Court should always be shown with parallel citations. For example: *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664 (1957).

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added to the second sentence of section (a) the language beginning "nor be considered" and rewrote section (c).

As section (b) was not changed by the amendment, it is not set out.

Rule 7.

JURORS

(a) Number of Jurors in Civil Jury Cases. In all civil jury cases the jury shall consist of six (6) members.

(b) Court Techniques to Insure a Fair Trial. In every case the court will endeavor to aid in the selection of an impartial jury. However, in the trial of criminal cases calculated to attract substantial public interest, in order to shield the jurors from prejudicial publicity and to insure the accused a fair trial, the court, on its own motion, or on the motion of either party, without disclosure of the identity of the movant, may, among other things, order a continuance, a change of venue, sequestration of jurors, sequestration of witnesses, expand the *voir dire* examination of prospective jurors and issue cautionary instructions.

(c) Examination of Jurors. The court shall conduct the examination of prospective jurors.

(d) Same: Scope.

(1) In conducting the examination of jurors in civil cases, the court shall interrogate the jurors in such a fashion and manner as reasonably calculated to elicit from the jurors any prior knowledge of the case, and any connection they might have with the litigants and their attorneys, either personally, professionally, socially, economically or otherwise. The jurors shall also be asked if they know of any reason why they could not sit with the other jurors, hear the evidence in the case, the arguments of counsel, and the instructions of the court, and then render to each of the parties a fair and impartial trial and verdict.

(2) In criminal cases, the line of questioning set out in subsection (d) (1) of this rule shall be followed, where appropriate, and in addition the court shall determine whether any juror is or has been a law enforcement or peace officer.

(e) **Same: Questions Requested by Counsel.** After the court has completed its interrogation, counsel may request additional questions to be asked the jurors. If deemed by the court to be proper, the jurors will then be interrogated with respect to the matters requested by counsel.

(f) **Jury Lists.**

(1) The names of prospective jurors for any session of court or for a specific case shall not be disclosed prior to their reporting for duty except in compliance with instructions of the court. No juror shall be approached, either directly or through any member of his immediate family, in an effort to secure information concerning his background.

(2) The clerk shall make available to counsel for the parties, or to any party acting *pro se*, a jury list which sets forth the name, general address and occupation of each juror when court is opened for the session or case for which the jurors were summoned.

(g) **Instructions to Jury.** In all cases tried by a jury, the points on which either party desires the jury to be instructed must be in writing and furnished to the court before jury arguments commence.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, changed the reference in present subsection (d) (2), rewrote present subsection (f) (1) and deleted "When the jurors report for duty at a session of court" at the beginning and added the language

beginning "when court is opened" at the end of present subsection (f) (2).

The amendment adopted Oct. 14, 1971, effective Jan. 1, 1972, added present section (a) and redesignated former sections (a) through (f) as (b) through (g).

Rule 8.

JURY ARGUMENTS

In the trial of civil actions the party having the burden of proof shall have the right to open and close the jury argument, without regard to whether the defendant has offered evidence. If each of the parties has the burden of proof on one or more issues, the Court, in its discretion, shall determine the order of arguments. All arguments shall be subject to such time limitations as may be imposed by the Court.

Comment: See Rule 29.1, F.R.Cr.P. entitled "*Closing Argument*" in criminal cases.

Editor's Note. — The amendment adopted May 13, 1977, rewrote the first sentence so as to

confine the application of this rule to civil actions. The amendment also substituted "If" for "Where" in the second sentence and "may" for "might" in the third sentence.

Rule 9.

TRANSCRIPT OF PROCEEDINGS

Upon request of any party, official court reporters will furnish transcripts of all proceedings at rates not exceeding transcript rates established by the Judicial Conference of the United States.

Special arrangements must be made in advance of the trial for daily copy.

A certified copy of all transcripts must be delivered to the clerk for the records of the court without charge to the parties. Except as to transcripts to be paid for by the United States, the court reporter shall not be required to prepare transcripts without the deposit of adequate security, or to furnish such transcripts prior to the payment therefor. 28 U.S.C. § 753(f).

Editor's Note. — The amendment adopted March 14, 1975, rewrote the first paragraph.

Rule 11.

TRIAL PUBLICITY

(a) Photographing and Reproduction of Court Proceedings. The taking of photographs in the courtroom or its environs, or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States magistrate, whether or not court is actually in session, is prohibited. The word "environs" is defined to mean the offices and corridors on floors on which are located courtrooms or offices of the United States attorney, the United States marshal, the United States district court clerk or the United States probation officer. Proceedings, other than judicial proceedings, designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the court, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast from the courtroom, under the supervision of the court.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, deleted "commissioner or" following "United States" in the first sentence of section (a).

As section (b) was not changed by the amendment, it is not set out.

Rule 12.

ORDERS AND JUDGMENTS GRANTABLE BY CLERK

Pursuant to the provisions of Rule 77(c), Federal Rules of Civil Procedure, the clerk is authorized to grant and enter the following orders and judgments without further direction by the court, but his action may be suspended, altered or rescinded by the court for cause shown:

- (1) Consent orders for the substitution of attorneys.
- (2) Consent orders extending for not more than 60 days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, Federal Rules of Civil Procedure, or requests for admission as provided for in Rule 36, Federal Rules of Civil Procedure. Matters in bankruptcy and those matters set forth in Rule 6(b), Federal Rules of Civil Procedure, are not included in this authorization.
- (3) Consent orders extending for not more than 60 days the time to file the record on appeal and to docket the appeal in the appellate court, except in criminal cases.
- (4) Consent orders dismissing an action, except in bankruptcy proceedings and in causes to which Rule 23(c) and Rule 66, Federal Rules of Civil Procedure apply.
- (5) Judgments of default as provided for in Rule 55(a) and 55(b) (1), Federal Rules of Civil Procedure.
- (6) Orders canceling liability on bonds other than orders disbursing funds from the clerk's registry account.
- (7) Orders changing the time of opening and adjourning court in absence of the judge.
- (8) *Ex parte* orders authorized by Local Rule 21(h).

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "60 days" for "30 days" near the beginning of subdivisions (2) and (3), added "other than orders

disbursing funds from the clerk's registry account" at the end of subdivision (6), and added subdivision (8).

Rule 15.

CUSTODY AND DISPOSITION OF MODELS, EXHIBITS AND DEPOSITIONS

(b) Removal.

(1) All models, diagrams, exhibits, depositions, or other material placed in the custody of the clerk shall be removed by the party offering such evidence, or filing such materials, within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court. At the time of removal, a detailed receipt shall be given to the clerk and filed in the case jacket.

(2) If the party offering, or filing, models, diagrams, exhibits, depositions or other material fails to remove such materials as provided herein, the clerk shall write the attorney of record, or if none, the party offering the evidence, calling attention to the provisions of this rule. If after the mailing of such notice the materials have not been removed within 30 days, they may be destroyed by the clerk.

Editor's Note. — The amendment adopted Aug. 2, 1973, substituted "within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court" for "except as otherwise directed by the

Court, within 30 days after the judgment becomes final" at the end of the first sentence of section (b)(1).

As section (a) was not changed by the amendment, it is not set out.

II. Civil Rules

Rule 17.

FORM OF PLEADINGS AND DOCUMENTS

(a) Generally.

(1) All pleadings following the complaint and papers submitted for filing must designate the case number of the action and fully conform to the provisions of Rules 10 and 11, Federal Rules of Civil Procedure. Each paper presented to the clerk for filing shall be flat and unfolded, without manuscript cover, and firmly bound. The pages shall be legal size and numbered at the bottom. Double spacing is preferred.

(2) Requests for temporary restraining orders or injunctive relief set forth in complaints shall be treated as any other prayers for relief. If facts and circumstances are deemed to warrant urgent, preferential consideration of a request for a temporary restraining order or injunctive relief, such request shall be set out in a motion complying with the requirements of Local Rule 21.

(3) Where the complaint discloses that none of the plaintiffs or defendants is a resident of the division in which the complaint is captioned for filing, the clerk shall change the caption so as to designate the filing of the complaint and the issuance of the summons in a division in which one of the plaintiffs or one of the defendants reside. The clerk shall promptly notify the plaintiff, or his counsel, of the division in which the case has thus been docketed. The same procedure shall be followed in civil cases removed from the state courts to the district court.

(b) Class Actions. In any case sought to be maintained as a class action:

(1) The complaint shall bear next to its caption the legend, "Complaint — Class Action."

(2) The complaint shall contain under a separate heading, styled "Class Action Allegations":

(a) A reference to the portion or portions of Rule 23, F.R.Civ.P., under which it is claimed that the suit is properly maintainable as a class action.

(b) Appropriate allegations thought to justify such claim, including, but not necessarily limited to:

1. the size (or approximate size) and definition of the alleged class,
2. the basis upon which the plaintiff (or plaintiffs) claims
 - (i) to be an adequate representative of the class, or
 - (ii) if the class is comprised of defendants, that those named as parties are adequate representatives of the class.
3. the alleged questions of law or fact claimed to be common to the class, and
4. in actions claimed to be maintainable as class actions under subdivision (b)(3) of Rule 23, F.R.Civ.P., allegations thought to support the findings required by that subdivision.

(3) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, F.R.Civ.P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the court for renewal of the motion before the same judge.

(4) The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross claim alleged to be brought for or against a class.

(5) The burden shall be upon any party seeking to maintain a case as a class action to show the court that the action is properly maintainable as such. If the court determines that an action may be maintained as a class action the party obtaining that determination shall initially bear the expenses of and be responsible for giving such notice as the court may order to members of the class.

(6) In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the court. Any such proposed communication shall be presented to the court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the court, or the administration of justice.

The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or a prospective client consulted with, employed or proposed to employ the attorney or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein. Nor does the rule forbid communications protected by a constitutional right. However, in the latter instance the person making the communication shall within five days after such communication file with the court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(c) Prisoner Petitions Filed Pro Se under 42 U.S.C. § 1983. Pro se petitions by prisoners seeking relief under 42 U.S.C. § 1983 shall be filed in compliance with instructions and on forms available without charge in the office of the clerk.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added present subsection (2) and redesignated former subsections (2) and (3) as (3) and (4) of section (a).

The amendment adopted March 14, 1975, designated the former provisions of this rule as section (a) and added section (b). In present section (a) the amendment inserted "following the complaint" near the beginning of the first sentence and added the second, third and fourth sentences of subsection (1) and deleted former subsection (4), which required that each paper presented to the clerk for filing be flat and unfolded, without manuscript cover, and firmly bound.

The amendment adopted Sept. 3, 1975, substituted "initially bear the expenses of" for "be charged with the expense" in the second sentence of subsection (5) of section (b).

The amendment adopted October 12, 1976, substituted "the latter instance" for "such instances" near the beginning of the last sentence of subsection (6) of section (b).

The amendment adopted May 13, 1977, added section (c).

Applied in *Garrett v. R.J. Reynolds Indus., Inc.*, 81 F.R.D. 25 (M.D.N.C. 1978).

Rule 18.

FILING FEE AND SECURITY FOR COSTS

(a) Initiating Civil Actions. Any party, other than the United States government or its departments and agencies, shall pay a filing fee of \$15.00 upon instituting any civil action, suit or proceeding, whether by original process, removal or otherwise, except that on application for a writ of habeas corpus the filing fee shall be \$5.00.

No bond nor security for costs shall be required of parties instituting civil actions, unless otherwise ordered by the court, except as required by 28 U.S.C. § 1446(d) upon filing of a petition for removal of a civil action or proceeding.

(b) Filing Notice of or Petition for Appeal. Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari \$5.00 shall be paid to the clerk of the district court, by the appellant or petitioner. 28 U.S.C. § 1917.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, rewrote former sections (a) and (b) (now section (a)) and added former section (c) (now section (b)).

The amendment adopted Aug. 2, 1973, deleted former subsection (2) of section (a), requiring a

\$200 bond or deposit as security for costs.

The amendment adopted July 17, 1975, rewrote former sections (a) and (b) as present section (a) and redesignated former section (c) as (b).

Rule 19.**FILING OF PAPERS AND SERVICE****(b) Service of Papers.**

(1) Except in cases in which the United States is a party, it shall be the responsibility of counsel filing papers to serve *one* copy on each opposing party or his counsel.

(2) In cases in which the United States is a party, in addition to the copies of the summons and complaint required by Rule 4(d)(4) and 4(d)(5), Federal Rules of Civil Procedure, *three* copies of each pleading or other paper shall be served on the United States attorney.

(e) Files in Condemnation Actions Commenced by the United States.

Where the United States files separate condemnation actions and a single declaration of taking relating to those separate actions, the clerk is authorized to establish a Master File in which the declaration of taking may be filed, and the filing of the declaration of taking therein shall constitute a filing of the same in each of the actions to which it relates.

Editor's Note. — The amendment adopted March 14, 1975, deleted "patent, trade-mark and anti-trust cases, and" following "Except in" at the beginning of subsection (1) of section (b), deleted former subsection (2) of section (b), which required two copies of all papers to be served in patent, trade-mark and anti-trust

cases, and redesignated former subsection (3) of section (b) as (2).

The amendment adopted July 17, 1975, added section (e).

As the rest of the rule was not changed by the amendments, only sections (b) and (e) are set out.

Rule 21.**MOTIONS IN CIVIL ACTIONS**

(a) Form. All motions and objections to interrogatories and requests for admissions, unless made during a hearing or trial, shall be in writing.

(b) Content. All motions shall state with particularity the grounds therefor, shall cite any statute or rule of procedure relied upon, and shall set forth the relief or order sought.

(e) Decided on Motion Papers and Briefs.

(1) Motions shall be considered and decided by the court on the pleadings, admissible evidence in the official court file, motion papers and briefs, without hearing or oral argument, unless otherwise ordered by the court.

Special facts, considerations or reasons thought by counsel sufficient to warrant a hearing or oral argument may be brought to the court's attention by memorandum filed contemporaneously with their motion (or response).

(2) If oral argument is ordered, it shall be heard on the date and in such division within the district as the court may designate.

(3) The clerk shall give at least five days' notice of the date and place of oral argument. The court, however, for good cause may shorten the five-day notice period.

(h) Extension of Time for Filing Supporting Documents and Briefs. The clerk may enter an *ex parte* order, or approve a stipulation by the parties, specifying the time within which supporting documents may be filed pursuant to subsections (f) and (g), upon a showing in writing that such documents are

not available or for good reason cannot be filed contemporaneously with the motion or response. Applications for extensions of time by the clerk, together with a proposed order, shall be filed with the motion or response to which they relate. The time allowed an opposing party for filing a responsive document(s) shall not run during any such extension.

(k) Conference of Attorneys with Respect to Motions and Objections Relating to Discovery. To curtail undue delay in the administration of justice, the court shall hereafter refuse to consider motions and objections relating to discovery and production of documents, pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, unless moving counsel shall first advise the court in writing that after personal consultation and sincere attempts to resolve differences they are unable to reach complete accord. The statement shall set forth the date of the conference, the names of the participating attorneys and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference, and in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court in the division in which the action is pending.

(l) Motions for Continuance. All motions to continue a pre-trial conference, hearing on a motion, or the trial of an action shall be presented to the court for its consideration, even though counsel have agreed to such continuance. No such continuance will be granted other than for good cause and upon such terms and conditions as the court may impose.

(n) Failure to File and Serve Motion Papers. If briefs are required, the failure of the movant or respondent to file a brief, or the failure of a respondent to file his response, within the times specified in this rule, shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect. A motion unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be summarily denied. A response unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be disregarded and the motion to which it expresses opposition considered and decided as an uncontested motion. If a respondent fails to file his response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and normally will be granted without notice to the parties.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, made changes in sections (a), (h), (l) and (n). In section (a), the amendment substituted "and" for "including" following "motions" near the beginning of the section. In section (h), the amendment inserted "Response" in the catchline and "a response" and "response and/or" in the first sentence, inserted "briefs" and "the clerk may" the second time those words appear in the first sentence, deleted the former second sentence and rewrote the last sentence. In section (l), the amendment added "All" at the beginning of the first sentence and substituted the language beginning "shall be presented" for "shall not be granted by the mere agreement by counsel" at the end of the first sentence and deleted "Any such motion, verbal or written, must be considered by the court, and" at the beginning of the second sentence. In section (n), the amendment substituted "of the right thereafter to file" for "to file thereafter" in the

first sentence and inserted "the motion to which it expresses opposition" in the third sentence.

The amendment adopted March 14, 1975, substituted "Form" for "Must Be in Writing" in the catchline to section (a) and "Content" for "Ground Must Be Stated" in the catchline to section (b), inserted "shall cite any statute or rule of procedure relied upon" in section (b), rewrote section (e) and substituted "consider" for "here" near the beginning of the first sentence of section (k).

The amendment adopted July 17, 1975, rewrote the first paragraph of subsection (1) of section (e) and substituted "considerations or reasons" for "or considerations" and inserted "or oral argument" in the second paragraph of that subsection. The amendment also added the third sentence in section (h).

The amendment adopted May 13, 1977, rewrote section (h).

Only the sections changed by the amendments are set out.

Rule 22.**PRE-TRIAL AND DISCOVERY IN CIVIL CASES**

(f) **Use of Discovery Procedures.** Attorneys are expected to make the fullest possible use of all discovery procedures provided for by Rules 26 through 37, Federal Rules of Civil Procedure, rather than seek information or admissions at the conference of attorneys or at the final pre-trial conference.

A party filing interrogatories or requests for admissions shall number the same consecutively from the first such interrogatory or request filed to the last, regardless of the dates of filing or the number of sets of such interrogatories or requests filed.

Editor's Note. — The amendment adopted March 14, 1975, added the second paragraph of section (f).

As the rest of the rule was not changed by the amendment, only section (f) is set out.

Rule 24.**MINORS AND INCOMPETENTS AS PARTIES****(f) Same: Hearings.**

(1) Upon oral or written motion of the parties, the court will conduct a hearing to determine whether the settlement is fair and reasonable and for the best interests of the minor or incompetent.

(2) At the time of the hearing, the attorneys for the parties shall present, to the satisfaction of the court, the following:

(i) A statement of the facts giving rise to the cause of action set forth in the pleadings, the contentions of the parties with respect to liability and a stipulation covering all relevant and material facts not considered to be in genuine dispute.

(ii) A statement showing the nature and extent of the injuries, the extent of the recovery from such injuries, and the prognosis. Such statement shall be supported by copies of all pertinent medical reports, including a current report of the attending physician.

(iii) Statements of the attorney and parents or guardian of the minor or incompetent as to their satisfaction with the settlement, and their opinion as to the fairness and reasonableness of such proposed settlement.

(iv) If material, a statement showing the amount of the medical, hospital and other expenses incurred, or to be incurred, in the treatment of the injuries of the minor or incompetent.

(3) If deemed necessary, the parties should also be prepared to offer sworn testimony of witnesses and furnish documentary evidence in support of all findings made by the court.

(g) Consent Judgments Approving Settlement; Contents.

(1) Before judgments approving compromise settlements of claims of minors or incompetents are presented to the court, they shall be consented and agreed to by counsel for the parties to the action and by the next friend or guardian of the minor or incompetent.

(2) The judgment presented should provide, *inter alia*, that the parties have agreed to a settlement of all matters in controversy between them and the amount of the settlement; that the court has investigated the matter of the proposed settlement and considered the evidence offered by the parties; that the court is of the opinion, and finds as a fact, that the proposed compromise settlement is fair and reasonable and is for the best interests of the minor or incompetent; and that the court is of the opinion, and finds as a fact, that the

compromise settlement agreement should be ratified, approved and confirmed by the court.

(k) Payment of Judgment. The amount of the judgment shall be paid into the office of the clerk of this court and the clerk shall make such disbursements from the proceeds as provided by the judgment of the court. The balance of the proceeds of the judgment shall be paid to the legal guardian of the minor or incompetent, if within this state. If there is no such guardian, the balance of the proceeds shall be paid to the clerk of superior court of the county in this state in which the minor or incompetent resides. If the minor or incompetent does not reside within this state, the balance shall be paid to a legal guardian approved by the court.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added "Consent" at the beginning and "Contents" at the end of the catchline to section (g) and deleted the catchlines "To be consented to" at the beginning of subsection (1) and "Contents" at the beginning of subsection (2) of section (g). The amendment also inserted "in this state" in the third sentence of section (k) and added the fourth sentence of section (k).

The amendment adopted Aug. 2, 1973, rewrote subsection (1) of section (g), substituting "are" for "shall be" preceding "presented," "they" for

"the judgment" preceding "shall be consented" and "the" for "all" preceding "parties," inserting "and" preceding "by the next friend" and deleting "and, in cases where the minor is at least 18 years of age, by the minor plaintiffs" at the end of the subsection.

The amendment adopted March 14, 1975, deleted the former second sentence of subdivision (2)(iii) of section (f), which read: "If at least 18 years of age, a similar statement shall be presented by any minor plaintiff."

Only the sections changed by the amendments are set out.

Rule 25.

TRIAL PROCEDURE

(a) Opening Statements in Civil Actions. At the commencement of the trial of civil actions, the party upon whom rests the burden of proof shall state, without argument, his cause of action and the evidence by which he expects to sustain his claim. The adverse party shall then state, without argument, his defense and the evidence by which he expects to sustain same. If the trial is to the jury, the opening statement shall be made immediately after the jury is sworn. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial. Opening statements shall be subject to such time limitations as may be imposed by the court.

(b) Documentary Trial Exhibits. When counsel expect to examine a witness or may reasonably anticipate cross-examination concerning details of a document, they should have at trial a copy of such document for use by the trial judge in following testimony. Copies of such documents are not to be filed with the clerk.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "sworn" for "empaneled" at the end of the third sentence of section (a).

The amendment adopted March 14, 1975, designated the former provisions of this rule as section (a) and added section (b).

Rule 27.

TAXATION OF COSTS

(e) Costs in Cases Which Have Been Settled.

(1) The court will not determine the party entitled to recover costs or the amount thereof in any action terminated by compromise or settlement. Settlement agreements should resolve any issues relating to costs. In the absence of specific agreement, each party shall bear his own costs.

(2) It is preferred that costs be paid directly to the party entitled to reimbursement, who may then file a certificate of satisfaction with the clerk.

Editor's Note. — The amendment adopted May 13, 1977, added section (e). As the rest of this rule was not changed by the amendment, only section (e) is set out.

III. Criminal Rules

Rule 28.

PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES

The Court's Plan for the Prompt Disposition of Criminal Cases in compliance with Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974 (18 U.S.C. § 3161 *et seq.*), and the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5036, 5037), as approved by the Judicial Council, is a public document available through the office of the clerk of this court. The Court's Plan for the Prompt Disposition of Criminal Cases as it now exists and as it is hereafter amended and approved by the Judicial Council shall have the same force and effect as a local rule of this court.

Editor's Note. — The amendment adopted Nov. 7, 1972, effective Jan. 1, 1973, rewrote this rule so as to combine former Rules 28, 29 and 30 and to set out the court's plan for the prompt disposition of criminal cases. The amendment adopted Aug. 2, 1973, changed the time fixed for arraignment in the rule as rewritten in 1972. The amendment adopted Sept. 3, 1975, rewrote this rule, which formerly set out the court's plan for the prompt disposition of criminal cases.

Rule 29.

[Superseded]

Cross Reference. — See Editor's note to Rule 28.

Rule 30.

[Superseded]

Cross Reference. — See Editor's note to Rule 28.

Rule 34.

POST-CONVICTION MOTIONS

(a) **Generally.** Motions filed pursuant to 28 United States Code § 2255 making a collateral attack upon a sentence imposed by this court, and petitions for writs of habeas corpus filed in this court by persons in state custody, shall be in writing, signed and verified. Additionally, such motions and petitions shall be on forms supplied by the court, and, to the extent applicable, all information required by the form shall be fully and accurately given.

(b) **Federal Prisoners.** Upon the filing by a federal prisoner of a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, the clerk shall cause one copy of the motion to be delivered immediately to the United States attorney. The United States shall file an answer to each claim asserted, shall admit or deny the allegations or contentions upon which the petitioner relies and shall set forth affirmatively any other reason for denying relief. The United States shall attach to its answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, as may be material to the issues joined.

The original of the answer and attachments shall be filed with the clerk and a copy of the answer shall be served on the petitioner or his counsel within twenty days after the service of the motion, unless a shorter time is ordered by the magistrate or court. The date and method of service on the petitioner shall be indicated on the original answer filed with the clerk.

(c) **State Prisoners.** Upon the filing by a state prisoner of an application for a writ of habeas corpus under the provisions of 28 U.S.C. §§ 2241, et seq., the clerk shall cause one copy of the application to be mailed immediately to the respondent. The respondent shall file answer to each claim asserted, shall admit or deny the allegations or contentions upon which the petitioner relies, and shall set forth affirmatively any other reason for denying relief. The respondent shall attach to his answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, including the records of any post-conviction proceedings, as may be material to the issues joined.

The original of the answer and attachments shall be filed with the clerk and a copy of the answer shall be served on the petitioner or his counsel within twenty days (forty days in cases brought under 28 U.S.C. § 2254) after service of the application unless a shorter time is ordered by the magistrate or the court. The date and method of service on the petitioner shall be indicated on the original answer filed with the clerk.

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, designated the former provisions of this rule as section (a) and added sections (b) and (c). Sections (b) and (c) had been previously adopted by order dated Dec. 2, 1970, and designated therein as (a) and (b).

The amendment adopted Nov. 12, 1971, inserted "(forty days in cases brought under 28 U.S.C. § 2254)" in the first sentence of the second paragraph of section (c) and also inserted "the" preceding "court" near the end of that sentence.

Rule 35.

REPRESENTATION OF INDIGENT DEFENDANTS

The plan of the court for the representation of defendants who are financially unable to obtain an adequate defense, and for the furnishing of expert and other services, pursuant to the Criminal Justice Act of 1964, as amended, provides for representation by private attorneys.

A copy of the court's plan is available upon request of the clerk. Panels of attorneys in each division deemed competent to provide adequate representation for indigent defendants shall be maintained and revised from time to time as specified in the plan or as directed by the court so that all qualified members of the bar of this court may have equal opportunities to participate in and responsibilities for representation of defendants under the Act. The court may, in the exercise of its discretion, appoint attorneys to represent defendants under the Act whose names do not appear on the panels. Generally, an attorney shall have had one year of experience in the practice of law before being considered qualified to render service under the Act.

In approving compensation for services rendered by an attorney pursuant to the Criminal Justice Act of 1964 the court will observe the Judicial Conference guidelines which provide, in part, that "(T)he hourly rates of compensation fixed by the amended Act are designated and intended to be maximum rates and should be treated as such. In fixing the rate, the judge should bear in mind the qualification of attorneys and the relative difficulties encountered in presenting the case. These changes in the hourly rates were made, . . . , to meet the changes in the price structure of the nation since the original Act was passed. They are not intended to change the basic and underlying philosophy of the Act that the bar of the nation owes a responsibility to represent persons financially unable to retain counsel and that the compensation provided is not intended to equate private counsel fees."

Editor's Note. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, inserted "as amended" in the first paragraph.

The amendment adopted March 14, 1975, rewrote this rule.

IV. Bankruptcy

Rule 36.

CHAPTER X BANKRUPTCY CASES

Upon the filing of a petition seeking relief under Chapter X of the Bankruptcy Act, the clerk shall refer the case forthwith to the referee as bankruptcy judge; thereafter all proceedings in the case shall be before the referee except as otherwise provided by Rule 10-103 of the Chapter X Rules.

Editor's Note. — This rule was adopted Aug. 1, 1975. Former Rule 36, which related to filing

fees, was rescinded by order adopted March 14, 1975.

Rules 37-49.

[Rescinded]

Editor's Note. — These rules were rescinded by amendment adopted March 14, 1975.

V. United States Magistrates

Rule 50.

AUTHORITY OF UNITED STATES MAGISTRATES

(a) Duties under 28 U.S.C. § 636(a).

United States magistrates appointed by this court are authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may —

- (1) Exercise all the powers and duties conferred or imposed upon United States commissioners by law or the Federal Rules of Criminal Procedure;
- (2) Administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions;
- (3) Try persons accused of minor offenses committed within this district in accordance with 18 U.S.C. § 3401, order a pre-sentence investigation report on any such person who is convicted or pleads guilty or nolo contendere, and sentence such persons;
- (4) Conduct removal proceedings and issue warrants of removal in accordance with Rule 40, Federal Rules of Criminal Procedure;
- (5) Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184; and
- (6) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. § 1782.

(b) Orders by Magistrate; Nondispositive Pre-Trial Matters; Appeal.

- (1) In every case in which a United States magistrate issues a final order pursuant to the authority vested in him by virtue of 28 U.S.C. § 636(a)(1), any party shall have the right to appeal such order to a United States District Judge as provided herein unless
 - (A) The statute or rule granting authority to the United States magistrate to issue such order specifically provides a different procedure for review;
 - (B) Review of the order may ultimately be obtained in a trial of the action or in another proceeding. The appeal shall be effected in accordance with section (b)(3) of this rule.

Application for a stay of the order pending appeal must be made in the first instance to the magistrate.

- (2) In accordance with 28 U.S.C. § 636(b)(1)(A), a magistrate may hear and determine any pre-trial motion or other pre-trial matter, other than those motions specified in section (c) of this rule.
- (3) Any party may appeal from a magistrate's determination made under this section within ten (10) days after entry of the magistrate's order, unless a different time is prescribed by the magistrate or a judge. Such party shall file with the clerk of court, and serve on all parties, a written notice of appeal which shall specifically designate the order or part thereof appealed from and state concisely the basis for objection thereto. A judge of this court may reconsider the matters raised by the appeal and set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The judge may also reconsider any matter sua sponte.

(c) Dispositive Pre-Trial Motions and Prisoner Cases; Recommendations by Magistrate; Objections.

- (1) In accordance with 28 U.S.C. § 636(b)(1)(B) and (C), a magistrate may hear, conduct such evidentiary hearings as are necessary or

appropriate, and submit to a judge proposed findings of fact and recommendations for the disposition of:

(A) Applications for post-trial relief made by individuals convicted of criminal offenses;

(B) Prisoner petitions challenging conditions of confinement; and

(C) Motions:

1. For injunctive relief (including temporary restraining orders and preliminary injunctions),
2. For judgment on the pleadings,
3. For summary judgment,
4. To dismiss or quash an indictment or information made by a defendant,
5. To suppress evidence in a criminal case,
6. To dismiss or permit the maintenance of a class action,
7. To dismiss for failure to state a claim upon which relief may be granted,
8. To involuntarily dismiss an action, or
9. For judicial review of administrative determinations.

(2) Any party may object to the magistrate's proposed findings, recommendations or report issued under this section within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on all parties, written objections which shall set out or specifically identify the portions of the proposed findings, recommendations or report to which objection is made and state concisely the basis for such objection. Such party shall file with the clerk a transcript of the specific portions of any evidentiary proceedings to which objection is made. A judge shall make a de novo determination of those portions to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge normally will not conduct a new hearing, but will consider the record developed before the magistrate, and make his own determination on the basis of that record. The judge may also require briefing, receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

(3) A magistrate may exercise the powers enumerated in the Rules Governing § 2254 Cases in the United States District Courts and the Rules Governing § 2255 Proceedings for the United States District Courts, in accordance with the standards and criteria established in 28 U.S.C. 636(b)(1).

(d) Special Master References and Trials by Consent.

(1) A magistrate may serve as a special master subject to the procedures and limitations of 28 U.S.C. § 636(b)(2) and Rule 53 of the Federal Rules of Civil Procedure;

(2) Where the parties consent, a magistrate may serve as a special master in any civil case without regard to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure and try the issues of any civil case. The entry of final judgment in any civil case, however, shall be made by a judge of this court or at the direction of a judge.

(e) Other Duties.

A magistrate is also authorized to —

- (1) Conduct calendar and status calls of civil and criminal calendars, and determine motions to expedite or postpone the trial of cases;
- (2) Conduct pre-trial conferences, settlement conferences, omnibus hearings, and related pre-trial proceedings;
- (3) Conduct arraignments in cases not triable by the magistrate to the extent of taking a not guilty plea or noting a defendant's intention to

- plead guilty or nolo contendere and ordering a pre-sentence report in appropriate cases;
- (4) Receive grand jury returns in accordance with Rule 6(f) of the Federal Rules of Criminal Procedure;
 - (5) Conduct voir dire and select petit juries for the court;
 - (6) Accept petit jury verdicts in civil cases in the absence of a judge;
 - (7) Conduct necessary proceedings leading to the potential revocation of probation;
 - (8) Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings;
 - (9) Order the exoneration or forfeiture of bonds;
 - (10) Conduct proceedings for the collection of civil penalties of not more than \$200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);
 - (11) Conduct examinations of judgment debtors, in accordance with Rule 69 of the Federal Rules of Civil Procedure;
 - (12) Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act;
 - (13) Conduct such hearings as are necessary or appropriate, and submit to a judge proposed findings of fact and recommendations for disposition of applications for judgment by default pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, or motions to set aside judgments by default pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, in accordance with the procedure set out in section (c) of this rule;
 - (14) Consider an application by a complainant pursuant to 42 U.S.C. § 2000e-5(f)(1), and in such circumstances as may be deemed just, appoint an attorney for such complainant, and authorize the commencement of an action without payment of fees, costs, or giving security therefor;
 - (15) Issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States government;
 - (16) Require compliance with Local Rule 17(c) with regard to pro se petitions under 42 U.S.C. § 1983; and
 - (17) Perform any additional duty which is not inconsistent with the Constitution and laws of the United States.
- (f) Assignment of Duties of Magistrates.**
- (1) A magistrate may perform the duties authorized by 28 U.S.C. § 636(b) and sections (b) through (e) of this rule, upon specific designation by a judge of this court or pursuant to orders, instructions, or directions of the chief judge assigning court duties, directly or through the clerk.
 - (2) As used in these local rules "magistrate" means full-time United States magistrate. Part-time United States magistrates shall have and exercise the jurisdiction and powers set forth in their respective orders of appointment.

Editor's Note. — This rule was adopted by order dated Dec. 2, 1970, and was formerly designated Rule 17. It was renumbered Rule 50 by amendment adopted Sept. 17, 1971, effective Jan. 1, 1972.

The amendment adopted June 10, 1976, rewrote this rule.

The amendment adopted May 13, 1977, again rewrote this rule.

The amendment adopted June 9, 1978, added subsection (1) of section (b) and redesignated former subsections (1) and (2) of section (b) as (2) and (3).

Rule 51.**[Rescinded]**

Editor's Note. — This rule was adopted by order dated and effective September 17, 1971, and rescinded by order adopted May 13, 1977.

Rule 52.**FORFEITURE OF COLLATERAL SECURITY IN LIEU OF APPEARANCE**

Pursuant to Rule 8, Rules of Procedure, United States Magistrates, and in the interest of justice, good court administration and sound law enforcement, collateral may be posted in lieu of the appearance of the offender for certain petty offenses under federal statutes and regulations or state statutes made applicable by the Assimilative Crimes Statute (18 U.S.C. § 13), occurring within the jurisdiction of the United States magistrate, unless: (1) The offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

There shall be maintained in the office of the clerk and in the office of each United States magistrate, current lists of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be posted. These lists are not included in the court's printed rules because of their length, but shall be available to the public in the clerk's office upon request.

Upon the failure of the person charged with such offense or offenses to appear before the United States magistrate for trial, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any forfeitures of collateral for a traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses arising out of the same facts or sequence of events resulting in the original offense or offenses.

Editor's Note. — This rule was adopted by order dated Dec. 2, 1970, and was formerly designated Rule 36. It was renumbered Rule 52 by amendment adopted Sept. 17, 1971, effective Jan. 1, 1972.

The amendments adopted April 20, 1972 (rescinded by the amendment adopted Aug. 2, 1973), Aug. 2, 1973, and Nov. 8, 1973, made changes in the forfeiture-of-collateral schedule formerly set out in this rule.

The amendment adopted March 14, 1975, substituted "in the office of" for "with" preceding "each United States magistrate" in the first sentence and added the second sentence of the present last paragraph and deleted the former last paragraph, which included the forfeiture-of-collateral schedule.

The amendment adopted July 26, 1976, rewrote the first paragraph, substituting a reference to Rule 9, Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates for a reference to Rule 8, Rules of Procedure, United States Magistrates, and making other changes, rewrote the former last paragraph as the present second paragraph, substituting "lists" for "list" near the middle of the first sentence and "collateral may be posted in lieu of appearance" for "forfeiture of collateral security may be accepted" at the end of the first sentence and adding the language beginning "but shall be available" at the end of the second sentence. The amendment also substituted "such" for "an" preceding "offense" near the beginning of the first sentence of the present third paragraph,

substituted "magistrate" for "magistrates" and deleted "of the offense or offenses listed below" following "trial" near the middle of that sentence, substituted "forfeitures" for

"forfeiture" near the middle of the present fourth paragraph and deleted "not" preceding "arising" near the middle of the present last paragraph.

Appendix of Forms

Bankruptcy Forms

Forms 2-4

[Deleted]

Editor's Note. — Forms 2, 3 and 4 were deleted by amendment adopted March 14, 1975.

The United States District Court for the Eastern District of North Carolina

Rules of Court

I. General Rules

RULE

1. Attorneys.
 - D. Procedure for Admission.
2. Court Schedule and Conduct of Business.
 - B. Divisions of the District, Counties Comprising the Divisions, Regular Sessions of Court and Motion Days.
4. Motions Filed Prior to Trial.
 - H. Hearing on Motion.
17. Procedure in Habeas Corpus and Motions Under 28 U.S.C.A. § 2255.
 - B. State Prisoners.
19. United States Magistrates.
 1. Habeas Corpus — State Prisoners.
 2. Civil Rights Statute — 42 U.S.C. § 1983.
 3. Motions under 28 U.S.C. § 2255.
 4. Pre-trial and Discovery.
 5. Miscellaneous.
 6. Forfeiture of Collateral in Lieu of Appearance.
 7. Central Violations Bureau.
 8. Violation Notices.
 9. Reference of a Minor Offense Case to a Magistrate.
 - (a) Information Filed in the District.
 - (b) Transfer Under Rule 20 of the Federal Rules of Criminal Procedure.
 10. Additional Duties Assigned to the Full-Time Magistrate(s).
 - (a) Criminal Procedure.
 - (b) Civil Proceedings.

RULE

- (c) Special Master References.
- (d) Judicial Review of Administrative Proceedings.
- (e) Miscellaneous Duties.
11. United States Court Reporters.
20. [Forms.]

II. Civil Rules

2. Filing Fee and Security for Costs.
 - A. Initiating Civil Actions.
 - B. Bond for Costs.
3. Filing of Papers and Service.
 - E. Pro se Civil Actions by Persons in State or Federal Custody.

IV. Rules in Bankruptcy

15. Chapter X Bankruptcy Cases.

VI. Local Rules for Admiralty and Maritime Claims

1. Title and Scope.
2. Process: Return Thereof.
3. Publication.
4. Notice of Sale, Publication of.
5. Costs and Security, Stipulations for.
6. Stipulations, Form of.
7. Pleadings and Parties.
8. Verification of Pleadings and Answers to Interrogatories.
9. Intervention.
10. Appraisal and Appraisers and Other Matters.
11. Release of Seizures — Custodial Cost — General Bonds.

- RULE
12. Taxation as Costs.
13. Stay of Execution or of Release of
Property after Judgment or
Dismissal.

- RULE
14. Possessory Actions — Short Day
Return.
15. Claims after Sale, How Limited.
- 16-25. [Rescinded.]

I. General Rules

Rule 1. Attorneys

D. Procedure for Admission. Every person making application for admission to practice in this court shall, prior to being presented in open court for taking the required oath or affirmation, file a written application certified to by two attorneys who are members in good standing of the bar of this court, stating that the applicant is of good moral character and professional reputation and that he meets the requirements of these rules for admission to the bar of this court. Thereafter, eligible attorneys may be admitted to practice in this court by the court or by the fulltime United States Magistrate upon oral motion made by a member of the bar of this court.

Unless the court otherwise orders, all motions for admission will be considered on the opening of court on the first Monday morning in each month on which a session of court is to begin. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Upon the filing of a properly certified application as aforesaid and the payment to the clerk of an admission fee of \$10.00 the clerk may accept for filing papers signed by the applicant, but the applicant shall not be allowed to make appearances on behalf of clients in open court until the prescribed oath has been taken.

Editor's Note. — The amendment adopted May 7, 1976, rewrote the former first sentence of the second paragraph of section D as the present second sentence of the first paragraph, deleted the former second sentence of the second paragraph of section D, which provided that if required, the applicant should offer satisfactory evidence of his moral and

professional character, substituted "If" for "After" and "is" for "has been" in the second sentence of the second paragraph of section D and rewrote the last paragraph of section D.

As only section D was changed by the amendment, the rest of this rule is not set out.

Rule 2. Court Schedule and Conduct of Business

B. Divisions of the District, Counties Comprising the Divisions, Regular Sessions of Court and Motion Days. There shall be seven divisions of this court. Headquarters of each division and the counties comprising the divisions are as follows:

Name of Division	Headquarters	Counties Comprised	
Elizabeth City Division	Elizabeth City	Bertie	Hertford
		Camden	Pasquotank
		Chowan	Perquimans
		Currituck	Tyrrell

Name of Division	Headquarters	Counties Comprised	
		Dare	Washington
Fayetteville Division	Fayetteville	Gates	
		Cumberland	Sampson
		Robeson	
New Bern Division	New Bern	Beaufort	Lenoir
		Carteret	Martin
		Craven	Onslow
		Hyde	Pamlico
		Jones	Pitt
Raleigh Division	Raleigh	Franklin	Vance
		Granville	Wake
		Harnett	Warren
		Johnston	
		Bladen	Duplin
Wilmington Division	Wilmington	Brunswick	New Hanover
		Columbus	Pender
		Edgecombe	Northampton
Wilson Division	Wilson	Greene	Wayne
		Halifax	Wilson
		Nash	

Sessions of court and motion days shall be determined by the court and orders designating the sessions as to divisions shall hereafter issue.

Editor's Note. — The amendment effective Jan. 1, 1977, adopted Dec. 29, 1976, transferred Bertie, Washington and Tyrrell Counties from the Washington Division to the Elizabeth City Division; Beaufort, Hyde, Martin and Pitt Counties from the Washington Division to the New Bern Division; and Greene County from the Washington Division to the Wilson Division.

As the rest of the Rule was not changed by the amendment, only section B is set out.

Rule 4. Motions Filed Prior to Trial

H. Hearing on Motion. Motions will be considered and decided without a hearing, unless otherwise ordered by the court. Uncontested motions will not be denied without giving the movant an opportunity to be heard.

Editor's Note. — The amendment adopted Oct. 3, 1978 deleted "or unless requested by counsel for either movant or respondent" at the end of the first sentence of section H.

As the rest of this rule was not changed by the amendment, only section H is set out.

Rule 17. Procedure in Habeas Corpus and Motions Under 28 U.S.C.A. § 2255

B. State Prisoners. Upon the filing by a state prisoner of an application for a writ of habeas corpus under 28 U.S.C.A. § 2242, the clerk shall cause one copy of the application to be served immediately on the respondent, and the respondent shall file answer to each claim asserted and shall admit or deny the allegations or contentions upon which the petitioner relies, and shall set forth affirmatively any other reason for denying relief. The respondent shall attach to his answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, including the records of any post-conviction proceedings, as may be material to the issues joined.

The original and a copy of the answer and attachments shall be filed with the clerk and a copy served on the petitioner or his counsel within forty days after service of the application, unless a shorter time is ordered by the court.

Editor's Note. — The amendment adopted March 20, 1973, substituted "forty days" for "twenty days" in the second paragraph of section B.

As section A was not changed by the amendment, it is not set out.

Rule 19. United States Magistrates

In accordance with the provisions of 28 U.S.C. § 636(b), the judges of the United States District Court for the Eastern District of North Carolina hereby establish this rule specifying the additional duties to be performed by the part-time United States magistrates specially designated by the court within the Eastern District of North Carolina.

1. *Habeas Corpus — State Prisoners*

(a) In conformity with a practice heretofore established, all petitions for writs of habeas corpus shall be filed with or transmitted to the clerk at Raleigh, North Carolina, who shall forthwith assign the petitions in rotation to the judges of the district and mark the record accordingly. However, at the direction or under the supervision of the judges of the district, the clerk shall transmit and deliver forthwith any number or percentage of the total number or all of the petitions before the court, along with supporting documents to any magistrate specially designated by the court for his consideration as set out below.

(b) The magistrate is specifically authorized to enter orders permitting the filing of said petition in forma pauperis. If the magistrate deems the petition to be frivolous, or otherwise inappropriate for filing in forma pauperis, the magistrate shall report, verbally or in writing as directed by the judge to whom the case has been assigned, and said judge shall enter his order thereon.

(c) The magistrate shall thereafter report and recommend, either orally or in writing, to the judge whether, in the opinion of the magistrate, it is proper to grant a plenary hearing. If the magistrate is of the opinion that no plenary hearing is required, he shall submit in writing an outline of the facts and conclusions which support his opinion, or a report in the form of a proposed order, to the judge to whom the case has been assigned, which said facts and conclusions may be adopted, modified or rejected or, in the discretion of the judge, used merely as a guide for independent findings and conclusions by the judge. In any event, all orders granting plenary hearings or dismissing petitions shall be entered by the judge.

(d) In the discretion of the judge to whom said case has been assigned the magistrate may be requested to attend any plenary hearing for the purpose of preparing an outline of the facts and conclusions, or a report in the form of a proposed order, for the submission thereof to the judge who shall ultimately prepare same.

2. *Civil Rights Statute — 42 U.S.C. § 1983*

State prisoner complaints seeking relief under 42 U.S.C. § 1983, are to be assigned by the clerk to the judges under the rotation system of the district. However, under the direction or supervision of the judges of the district, the clerk shall transmit the complaint along with supporting documents to any magistrate for his consideration and for proceedings substantially as prescribed in habeas corpus matters.

The magistrate is specifically authorized to enter orders permitting the filing of said complaint in forma pauperis. If the magistrate deems the complaint to be frivolous, or otherwise inappropriate for filing in forma pauperis, the magistrate shall report, verbally or in writing, as directed by the judge to whom the case has been assigned and said judge shall enter his order thereon.

3. *Motions under 28 U.S.C. § 2255*

These motions are to be assigned by the clerk to the trial judge or, if the trial judge is not available, to any other judge. However, at the direction of the judge

to whom the motion has been assigned, the clerk shall transmit the motion along with supporting documents to any magistrate for his consideration and for proceedings substantially as prescribed in habeas corpus matters.

The magistrate is specifically authorized to enter orders permitting the filing of said motion in forma pauperis. If the magistrate deems the motion to be frivolous, or otherwise inappropriate for filing in forma pauperis, the magistrate shall report, verbally or in writing, as directed by the judge to whom the case has been assigned and said judge shall enter his order thereon.

4. *Pre-trial and Discovery*

(a) In civil actions authority is given to the magistrates specially designated for that purpose to conduct pre-trial conferences, and to enter such orders thereon as would have otherwise been entered by the judge with respect to discovery, simplification of issues, stipulation of facts, scheduling of prescribed dates for various stages of proceedings, and other matters pertaining thereto, as prescribed by the Federal Rules of Civil Procedure and Civ. Rule 7, U.S. Dist. Ct., E.D.N.C. The magistrate shall not enter any order granting a continuance of any case pending before a district judge, but may grant continuances of matters pending before the magistrate. The action taken hereunder shall be upon the written authority of the judge to whom the case is assigned.

(b) In criminal actions authority is given to the magistrates specially designated for that purpose to hear and determine all motions relating solely to pre-trial discovery. Motions to suppress shall be heard by the judge. The action taken hereunder shall be upon the written authority of the judge to whom the case is assigned.

(c) *Warrant of Removal.* The magistrates are specially designated and authorized to issue a warrant of removal under Rule 40(b) (3), Federal Rules of Criminal Procedure.

(d) Each part-time magistrate is specially designated and assigned to conduct post-indictment and criminal information arraignments, accept not guilty pleas, and may order a presentence report on a defendant who signifies the desire to plead guilty.

5. *Miscellaneous*

The judges may, in their discretion, request the magistrates to perform such other duties as may be authorized by law and which are not inconsistent with the Constitution and laws of the United States.

6. *Forfeiture of Collateral in Lieu of Appearance*

Pursuant to Rule 9, Rules of Procedure, United States Magistrates, in the interest of justice, good court administration and sound law enforcement, for the petty offenses listed below, whether originating under the applicable federal statute or regulations or applicable state statute by virtue of the Assimilated Crimes Act, 18 U.S.C. § 13, occurring within the territorial jurisdiction of the United States magistrate, collateral may be posted in lieu of the appearance of the offender unless (1) the offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States magistrate for trial of the offense or offenses listed below, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any forfeiture of collateral for a traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

There shall be maintained in the office of the clerk and with each United States magistrate a current list of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may be posted in lieu of appearance by the person charged with the said offense are:

I. NATIONAL PARK SERVICE VIOLATIONS

Title 36, Chapter I, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
2.1	Abandoned or unattended property	\$ 25.00
2.2	Aircraft	25.00
2.3	Audio devices	25.00
2.4	Begging, hitchhiking, and soliciting	25.00
2.5	Camping: violation of camping regulations	25.00
2.6	Violation of closed areas	25.00
2.8(a) (b) (c)	Failure to restrain dogs, cats, or other pets	25.00
2.9(b)	Explosives or fireworks	15.00
2.10	False report	25.00
2.11	Unauthorized possession of firearms, traps, or other weapons	25.00
2.12(a) (c)	Fires; leaving fires unattended	25.00
2.13(a)	Violation of fishing laws	25.00
2.13(b)	Use of bait on fishing stream	50.00
2.14	Fraudulently obtaining accommodations	25.00
2.16(c)	Possession of intoxicants by minors	25.00
2.17	Lost and found articles	15.00
2.18	Picnicking	15.00
2.19	Operation of portable engines and motors	25.00
2.20	Minor violations concerning preservation of public property, beaches, resources, etc.	15.00
2.21	Public assemblies, meetings	25.00
2.22	Report of injury or damage	25.00
2.23	Saddle or pack animals	25.00
2.24	Sanitation regulations	25.00
2.25	Scientific specimens	25.00
2.26	Use of skates or skateboards	25.00
2.27	Conducting sports events, entertainment, or other public attractions without permit	25.00
2.28	Swimming, bathing, or use of certain water sports equipment where prohibited	25.00
2.29	Tampering with personal property not under one's lawful control without theft or damage	50.00
2.30	Travel on National Scenic Trails by use of prohibited vehicles	50.00
2.31	Water skiing where prohibited	25.00
2.32(a) (2)	Feeding or molesting wildlife	25.00
2.33	Winter sports	25.00
2.39	Sale and distribution of printed matter	25.00
4.1	State laws regulating traffic and use of vehicles unless covered by sections 4.2-4.21	(See Sub-section III)

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
4.3	Bicycles	\$25.00
4.4	Commercial towing service	25.00
4.5	Driver's license	40.00
4.7	Established entrances and exists	25.00
4.8	Excessive acceleration	25.00
4.11	Load, weight, length, and width limitations	25.00
4.13	Obstructing traffic	25.00
4.15	Report of vehicle accident	40.00
4.16	Yield right-of-way	25.00
4.18(a)	Failure to comply with signs and regulating parking	15.00
4.18(b)	Failure to obey authorized personnel directing traffic	25.00
4.18(c)	Failure to obey authorized personnel directing traffic	50.00
4.19	Travel on roads	25.00
4.21	Operation of vehicle without safe brakes	25.00
5.1	Advertising within parked areas	25.00
5.2	Sale of alcoholic beverages or intoxicants	75.00
5.3	Soliciting; engaging in business	25.00
5.4	Commercial passenger-carrying motor vehicles	25.00
5.5	Commercial photography	75.00
5.6	Commercial vehicles on park area roads	
	a. pick-up trucks, vans, and cars	25.00
	b. trucks over one and one-half tons and semitrailers	100.00
5.7	Construction of buildings or other facilities	50.00
5.8	Discrimination in employment practices	50.00
5.9	Discrimination in furnishing public accommodations and transportation services	50.00
5.10	Violations in eating, drinking, and lodging establishments	50.00
5.11	Impounding of animals	25.00
5.12	Memorialization	25.00
5.13	Nuisances	25.00
5.14	Prospecting, mining and mineral leasing	25.00
5.15	Residents on federal lands	25.00
5.16	Trespassing on federal lands	25.00
6.5	Wrongful entry without paying fee	10.00
7.14(b) (1)	Possession of beer or alcoholic beverage in open or unsealed container	25.00
7.14(b) (2)	Possession of beer or alcoholic beverage in open or unsealed container in a motor vehicle	50.00
7.76(b)	Wright Brothers National Memorial Airstrip; use of airstrip	75.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>
2.7	Disorderly conduct
2.9(a)	Unauthorized use or possession of explosives
2.11	Unauthorized use of firearms, traps, and other weapons for destroying animal life

<i>Section Number</i>	<i>Offense</i>
2.12(b) (d) (e) (f)	Unauthorized or unsafe kindling of fires
2.14	Fraudulently obtaining accommodations
2.15	Gambling; operation of gambling devices
2.16(a)	Intoxication in park area
2.16(b)	Sale of intoxicants to minors
2.20	Major violations of regulations for preservation of public property, natural features, and resources
2.29	Tampering with or unlawful possession of personal property not under one's lawful control with the result of theft or damage
2.32	Hunting, trapping, capturing, or killing wildlife: Small game Bear, boar or deer hunting
2.37(b) (1) (2)	Delivery or possession of controlled substance

II. NATIONAL FOREST SERVICE VIOLATIONS

Title 36, Chapter II, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
212.7(3)	Unauthorized use of vehicle upon a closed road . . . \$	25.00
212.7(4)	Damaging any road or road segment	25.00
212.20(c) (4)	Unauthorized use of National Forest Development trails	25.00
212.20(d)	Prohibited acts on National Forest	
	Development trails (Minor violations)	25.00
	1. Willfully tearing down, removing, or defacing any sign or notice	
	2. Mutilating, defacing, disturbing, removing, or destroying objects of natural beauty or scenic value	
	3. Destruction of, damage to, or removal of any living tree or plant	
	4. Creating an unsanitary condition by leaving refuse, debris, or wastes exposed or permitting discharge of harmful pollutants or wastes into water resources	
	5. Blocking, restricting, or otherwise impeding use of trail	
261.4(i)	Use of prohibited vehicles for cross-country travel	25.00
261.6	Unauthorized cutting, damaging, marking, or removing timber or other forest products (minor violations)	25.00
261.8(a)	Exceeding the fishing creel limit	25.00
	Each fish in excess of limit	10.00
261.8(b)	Simple possession of firearms or equipment used for hunting, fishing, or trapping	25.00
261.11(b)	Construction of any work, structure, or fence; conducting any work, or business	50.00
261.11(d)	Littering or polluting waters	25.00
261.11(h)	Operation of motorboats on bodies of water in violation of regulations (excessive speed, unnecessary noise)	50.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
261.11(i)	Entry upon a permanently closed area	\$25.00
261.11(j)	Occupancy or use of land violations	25.00
261.11(k)	Entry upon closed areas	25.00
261.11(l)	Placing a vehicle or other object upon land in a manner causing impediment or hazard	25.00
261.11(m)	Entering a wilderness area without a permit	25.00
291.4	Failure to comply with sanitary regulations in a recreation area	25.00
291.5(d)	Selling or offering merchandise for sale	25.00
291.5(e)	Distribution of advertising material	25.00
291.6	Use of audio devices in recreation area	25.00
291.7	Failure to comply with occupancy and use regulations on recreation sites	25.00
291.8(b)	Driving or parking vehicle or trailer except in places provided	25.00
291.8(d)	Driving bicycles, motorbikes, or motorcycles on trails at recreation sites	25.00
291.8(e)	Driving bicycles, motorbikes, or motorcycles on roads in recreation sites for other than ingress or egress	25.00
291.9	Failure to pay entrance or recreation fees	10.00
293.17	Violation of any National Forest Primitive Area regulations	50.00
295.6	Operating conditions for off-road vehicles on areas or trails of National Forest System lands:	25.00
	(a) Operation without a valid operator's license or learner's permit	
	(b) Operation by unlicensed person under 18 years of age unless accompanied by adult with valid license	
	(d) Operation in excess of speed limits	
	(g) Operation not in conformance with applicable state laws	
	(h) Operation with defective muffler	
	(i) Operation of vehicle not equipped with properly installed spark	
	(j) Operation with defective brakes	
	(k) Operation without working headlights or taillights	
	(l) Operation of vehicle emitting excessive noise	
295.7	Use of off-road vehicle as prohibited	25.00
295.8	Use of off-road vehicle as prohibited without permit	25.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>
212.7(4)	Damaging or leaving in a damaged condition any road or road segment
212.20(d)	Destruction of government property — all major offenses
261.1	Interfering with Forest Officer
261.2	Setting fires; building campfires in a dangerous place; failure to extinguish campfire; violations of other similar forest fire safety regulations

<i>Section Number</i>	<i>Offense</i>
261.4(a-g)	Damaging, defacing, destroying, or removing government property or objects of natural beauty; entering or using Forest Service building except in emergency
261.6	Unauthorized cutting, damaging, marking, or removing timber or other forest products (Major offenses)
261.7	Unauthorized livestock use
261.8(a)	Hunting, trapping, or fishing out of season; taking or having in possession any wild animal, bird, or fish (except creel limit), spotlighting violations
261.8(b)	Trespass with firearms
261.11(a)	Squatting or making settlement on Forest Service land
261.11(c)	Placing stock within enclosure
261.11(e)	Discharging firearms
261.11(f)	Unauthorized grazing of animals
261.17	Unauthorized use of pesticides
291.5(a)	Indecent conduct
295.6(f)	Operation of any off-road vehicle in a manner creating excessive damage or disturbance to the land, wildlife, or vegetative resources

III. TRAFFIC OFFENSES

(Including those to which N.C. laws are applicable)
Title 36, Chapter I, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
	A. Speeding	
	1. 0-5 mph over applicable limit	\$ 15.00
	2. 6-10 mph over applicable limit	20.00
	3. 11-15 mph over applicable limit	25.00
	4. 16-20 mph over applicable limit	35.00
	B. Other violations	
	Driving without a valid operator's license	40.00
4.8	Excessive acceleration	25.00
4.9	False report	25.00
	Following too closely	25.00
	Load, length, height, and width limitations	25.00
4.13	Obstructing traffic	25.00
4.16	Right-of-way	25.00
	Driving wrong way on dual-lane highway	40.00
	Driving wrong way on one-way city street	15.00
	Improper passing	25.00
	Litterbugging	30.00
	Failure to dim lights	25.00
	Illegal transportation of one quart or less of taxpaid liquor with seal broken in passenger area	25.00
	Parking violations	15.00
	Exceeding a safe speed	15.00
	Violation of vehicle inspection law	15.00
	Failure to stop for a red light or stop sign	15.00
	Improper turn or signal	15.00
	Improper vehicle equipment	15.00

<i>Offense</i>	<i>Collateral</i>
Violation of vehicle registration law, except involving stolen or altered registration	15.00
Any other violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

- All pleas of not guilty
- All felonies
- Any violation resulting in personal injury
- Driving under the influence (G.S. 20-138; G.S. 20-139)
- Careless or reckless driving (G.S. 20-140; G.S. 20-140.1)
- Exceeding the applicable speed limit by over 21 mph
- Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged races) (G.S. 20-141.3)
- Passing stopped school, school activities, or church bus
- Failure to yield right-of-way to emergency vehicles
- Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire
- Illegal transportation of more than 1 quart of liquor
- Leaving the scene of an accident in which involved, or failing to report such an accident (G.S. 20-166; G.S. 20-166.1)
- Driving while license suspended or revoked, or permitting an owned vehicle to be so operated (G.S. 20-28; G.S. 20-34)
- Driving with false, forged, or altered driver's license, or permitting an owned vehicle to be so operated
- Any violation of the Financial Responsibility laws (Chapter 20, Articles 9A and 13)
- Any violation of vehicle registration laws involving stolen or altered registration plates or certificates
- Any violation involving a false affidavit, or false statement under oath, or perjury (G.S. 20-17(5); G.S. 20-31; G.S. 20-313.1)
- Any violation charged in the same warrant or summons with a mandatory appearance violation

IV. NATIONAL FISH AND WILDLIFE VIOLATIONS

Title 50, Chapter I, Code of Federal Regulations
and Title 16, United States Code

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
THE MIGRATORY BIRD TREATY ACT:		
16 U.S.C. 703	Take or possess migratory nongame birds	\$ 50.00
	Each bird so possessed	10.00
	Sell, barter, or trade nongame birds	150.00
MIGRATORY GAME BIRDS:		
20.21(a)	Take with illegal device	100.00
20.21(b)	Take with unplugged shotgun	50.00
20.21(c-h)	Take with unlawful methods or devices	100.00
20.21(i)	Take with aid of bait	200.00
20.24	Exceeding daily bag or possession limit	100.00
20.33		
20.34	Each bird in excess of limit	25.00
20.35		
26.5	Hunting along or in National Wildlife Refuge . . .	100.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
20.25	Failure to retrieve killed or crippled birds	\$100.00
	Each bird not retrieved	25.00
20.31	Possession of birds taken in violation of sections 20.21-20.25	100.00
20.22	Take or possess freshly killed migratory game birds during closed season	150.00
20.32	Each bird so possessed	25.00
20.36	Failure to tag birds	50.00
20.27	Receiving or having custody of untagged birds belonging to another — each bird	25.00
20.81		
20.38	Possessing or transporting live game birds	100.00
	Each bird so possessed or transported	25.00
20.61	Unlawful importation	100.00
20.62	Miscellaneous regulations adopted for special areas or conditions	50.00

MIGRATORY BIRD HUNTING STAMP ACT:

16 U.S.C. 718	Take migratory birds without duck stamp	25.00
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MIGRATORY BIRD CONSERVATION ACT — NATIONAL WILDLIFE REFUGE:

16 U.S.C. 715	National Wildlife System — Title 50, Subchapter C, Part 26, Code of Federal Regulations	
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<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
26.2	Trespassing on any wildlife refuge area	\$25.00
26.3	Unauthorized entering, occupying, using or being upon wildlife area	25.00
26.4	Unlawfully permitting domestic animals to enter upon or roam at large in wildlife areas	25.00
26.5	Hunting, killing, or taking, or attempting to hunt, kill, or take any animal in wildlife refuge area	200.00
26.6	Fishing, taking, seining, or attempting to fish, take, or seine any fish or aquatic animal in wildlife refuge area	50.00
26.7	Trapping of, or attempting to trap, animals on wildlife refuge area	200.00
26.8	Molesting, disturbing, damaging, or destroying plant or animal life on wildlife refuge area (minor violations)	15.00
26.11	Spotlighting in wildlife refuge area	25.00
26.12	Unauthorized carrying of, possessing, or discharging firearms or explosives	15.00
26.13	Use or possession of crossbows, bow and arrow, air guns, or other weapons on wildlife refuge area	25.00
26.14	Travel in or use of motorized land, air, or water vehicle on specific routes in designated areas posted for public use	50.00
26.15	Unauthorized use of boats in wildlife area	15.00
26.16	Unauthorized conducting of field trials on wildlife refuge area	25.00
26.17(b-f)	Building campfires; leaving fires unattended;	

Section Number	Offense	Collateral
	discarding burning cigarettes; other similar acts	\$25.00
26.19	Littering and disposing of wastes	25.00
26.22	Abandonment of personal property	25.00
26.23	Distributing advertising material	75.00
26.24	Soliciting business or conducting other commercial enterprises	25.00
26.26	Begging	25.00
26.27	Unauthorized making of motion or sound pictures	100.00
26.30	Operation of electrical sound equipment in a disturbing manner	25.00
26.31	Tampering with motor vehicle, boat equipment, or machinery	100.00
27.1	Failure to exhibit permits upon request by authorized officer	25.00
28.1	Failure to comply with regulations and posted notices	25.00
28.6	Entrance, travel, or exit from wildlife area via routes not designated for public use	25.00
28.7(a) (b) (d-j)	Violations of motor vehicle regulations	25.00
28.8	Possession, transportation, or use of firearms	100.00
28.21(a-g) (i)	Operation of boat in wildlife refuge area without permit when required or in violation of permit regulations	25.00
28.22	Water skiing violations	25.00
28.25	Violation of special regulations	50.00
32.2(a-d)	Violation of general hunting regulations applicable to lawful hunting on wildlife refuge area	25.00
33.2(a-c)	Failure to comply with terms or conditions of access or use of wildlife refuge area	25.00
33.2(d)	Violation of special terms and conditions and special regulations governing hunting on wildlife refuge area	50.00

MANAGEMENT OF FISHERIES CONSERVATION AREAS — NATIONAL FISH HATCHERIES:

Section Number	Offense	Collateral
16 U.S.C. 742a et seq.		
70.4(b)	Unlawful taking of fish or other aquatic animals . . .	\$100.00
70.4(c)	Hunting, taking, or attempting to take or hunt any animal	100.00
70.4(d)	Disturbing spawning fish	100.00
71.2(d)	Violation of applicable State laws governing area of National Fish Hatchery	25.00
71.2(e)	Failure to comply with terms and conditions of access to National Fish Hatchery	25.00
71.2(f)	Failure to comply with special notices governing hunting and fishing on National Fish Hatchery areas	25.00
71.12(d)		
71.12(c)	Failure to comply with applicable provisions of Federal law and other regulations on National Fish Hatchery areas	25.00

MANDATORY APPEARANCE VIOLATIONS

Note: Whoever, in violation of the Migratory Bird Treaty Act, shall:

- “(1) Take by any manner whatsoever any migratory bird with intent to sell, offer for sale, barter or offer to barter such bird, or
(2) Sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.” (16 U.S.C. 707(b)) Since this violation is a felony, forfeiture of collateral is not permissible.

<i>Section Number</i>	<i>Offense</i>
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MIGRATORY GAME BIRDS:

- | | |
|----------|--|
| 10.4(a) | Possess freshly killed birds, closed season |
| 10.41-53 | Take more than one hour before or after hours
Take during closed season |
| 16.2 | Take, sell, import, export, transport, possess or
dispose of without permit |

BLACK BASS ACT:

- | | |
|---------------|--|
| 16 U.S.C. 851 | Unlawful interstate transportation of fish |
|---------------|--|

LACEY ACT:

- | | |
|------------------|---|
| 16 U.S.C. 667(e) | Unlawful interstate transportation of game |
| 13 | Unlawful importation of prohibited species of fish,
game, or birds
Unlawful possession or transportation of prohibited
species of fish, game, or birds |

BALD EAGLE ACT:

- | | |
|---------------|---------------------------------------|
| 16 U.S.C. 668 | Unlawfully sell or take |
| 11 | Unlawful possession or transportation |

MIGRATORY BIRD CONSERVATION ACT — NATIONAL WILDLIFE REFUGES:

- | | |
|------|------------------------------------|
| 28.8 | Unlawful trespassing with firearms |
|------|------------------------------------|

V. CORPS OF ENGINEERS VIOLATIONS

Title 36, Chapter III, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
327.1(c)	Discrimination by lessee, licensee, or concessionaire	\$ 25.00
327.2(a)	Operation or parking of vehicles on roadways designated by signs	25.00
327.2(b)	Operation of off-road vehicle except in area and at time designated by sign	25.00
327.3(a)	Operation of vessel for fee	25.00
327.3(b)	Operation of vessel in prohibited area	15.00
327.3(c)	Operation of vessel in careless or reckless manner	25.00
327.3(d)	Unauthorized construction or habitation of mooring facilities	25.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
327.3(e)	Failure to remove or securely moor vessel not in use	\$25.00
327.5	Swimming violation	15.00
327.6	Picnicking violation	15.00
327.7(a)	Camping in area not designated for camping . . .	25.00
327.7(b)	Camping at fee site without paying designated fee	25.00
327.7(c)	Exceeding 14-day campgrounds limit	25.00
327.7(d)	Leaving camping equipment unattended at campsite to hold for future use	25.00
327.7(e)	Unauthorized digging of ground or construction of facilities — damage not exceeding \$25.00 . . .	25.00
327.7(f)	Failure to remove camping equipment or to clear campsites	25.00
327.8	Hunting, fishing, or trapping in restricted areas	25.00
327.9(a)	Dumping or disposing of refuse, garbage, litter, etc., except in designated places	25.00
327.9(b)	Bringing refuse, garbage, etc., onto developed area for purpose of dumping	50.00
327.10(a)	Storage of gasoline and other fuels	00
327.10(b)	Failure to confine fire to designated areas and facilities	25.00
327.10(c)	Gathering of wood for use as fuel	25.00
327.11(a)	Bringing or having horses in prohibited areas . . .	15.00
327.11(b)	Bringing uncontrolled dogs, cats, or pets into recreational areas	15.00
327.12(a)	Failure to observe posted visiting hours	25.00
327.12(b)	Making excessive or disturbing noise during quiet hours	25.00
327.12(c)	Operation of disturbing audio devices	25.00
327.13(b)	Possession or use of fireworks	25.00
327.14	Destruction of public property — damage not exceeding \$25.00	25.00
327.15(a)	Abandonment of personal property	25.00
327.17	Unauthorized advertising	25.00
327.18	Unauthorized business or commercial activities . .	25.00
327.19(a)	Refusing to comply with terms or conditions of permit	50.00
327.20	Unauthorized placing of structures within project area	50.00
327.21	Unauthorized conducting of special events or assemblies	25.00
327.22(b)	Unauthorized ranging, grazing, or watering livestock	25.00
327.22(c)	Unauthorized use of land or water for agricultural purposes	50.00
327.23	Violation of State or local law applicable to outgranted lands	25.00

MANDATORY APPEARANCE VIOLATIONS

327.2(c)	Careless or reckless operation of vehicles
327.4(a)	Operation of aircraft on land or water at other than at landing areas

*Section**Number**Offense*

327.4(b)	Unauthorized delivery by air of any person or thing
327.7(e)	Unauthorized digging of ground or construction of facilities — damage \$25.00 or more
327.13(a)	Possession of loaded firearms, explosives, and other certain weapons
327.14	Destruction of public property — damage \$25.00 or more
327.22(a)	Unauthorized occupation of land or facilities as residence
327.26	Interference with government employee in conduct of official duties

VI. GENERAL SERVICES ADMINISTRATION VIOLATIONS

Title 41, Chapter 101, Code of Federal Regulations

*Section**Number**Offense**Collateral*

20.301	Recording presence on Federal property outside normal working hours and/or displaying identification upon request	\$ 25.00
20.302	Littering or disposing of rubbish	15.00
20.303	Failure to comply with official signs and with directions of authorized person	15.00
20.304	Disorderly conduct; obstructing use of facilities or impeding officials	25.00
20.305	Gambling; conducting lottery pool	25.00
20.307	Soliciting; commercial advertising and vending . . .	25.00
20.308	Distribution of handbills, pamphlets, etc.	15.00
20.309	Photography	15.00
20.310	Bringing animals (except seeing-eye dogs) on premises	15.00
20.311	Vehicular or pedestrian traffic — failure to comply with signals and directions; blocking entrances or driveways; parking violations	15.00

MANDATORY APPEARANCE VIOLATIONS

*Section**Number**Offense*

20.302	Willful destruction, damage, or removal of Federal property or creating hazard to persons thereon
20.306	Operating a motor vehicle while under the influence of alcohol or drugs; entering upon Federal property under the influence of alcohol or drugs; use of drugs or alcoholic beverage
20.312	Carrying firearms, dangerous or deadly weapons or explosives, openly or concealed
20.313	Discrimination by segregation or otherwise on the basis of race, creed, color, sex, or national origin in furnishing or refusing facilities of a public nature
	Any violation charged in the same warrant or summons with a mandatory appearance violation
	All pleas of not guilty
	All felonies

VII. VETERANS ADMINISTRATION FACILITIES VIOLATIONS

Title 38, Part I, Sections 1.218 and 1.219, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
1.218(b)	Entry upon or failure to leave closed premises . . .	\$ 5.00
1.218(c)	Littering, willful damage or destruction of Government property from VA premises or national cemeteries causing loss to Government not exceeding \$50.00	10.00
1.218(d)	Refusal to comply with signs or directions of officials during emergencies	15.00
1.218(e)	Disorderly conduct	15.00
1.218(e)	Failure to leave premises when so ordered as a result of creating disturbances	15.00
1.218(f)	Gambling, selling lottery tickets, conducting lottery	25.00
1.218(h)	Soliciting, vending, or commercial advertising . . .	5.00
1.218(i)	Distribution of advertising material	5.00
1.218(j)	Photography; photography for commercial purposes	5.00
1.218(k)	Bringing animals (except seeing-eye dogs) onto VA premises	5.00
1.218(l)	Parking in or blocking emergency vehicle spaces; blocking access to fire hydrant or spaces reserved for physically handicapped	15.00
1.218(l)	Parking in reserved locations, parking time limit violations	15.00
1.218(l)	Failure to comply with traffic signs or directions; blocking drives, entrances, loading zones, etc. .	10.00
1.218(n)	Conducting services, ceremonies, or demonstrations	15.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>
1.218(c)	Willful destruction of Government property on VA premises or national cemetery causing damage of more than \$50.00
1.218(g) (l)	Careless or reckless driving; driving under the influence of alcohol or drugs; possession of alcohol or drugs
1.218(m)	Possession of firearms, deadly or dangerous weapons or explosives
1.218(o)	Unauthorized opening of or attempting to open locks or card-operated barrier systems, or possession of such keys or cards without authorization
1.218(p)	Prostitution, solicitation, and sexual misconduct All felonies All pleas of not guilty Any violation charged in the same warrant or summons with a mandatory appearance violation

7. Central Violations Bureau

A Central Violations Bureau is hereby established, under the jurisdiction of the clerk of court at Raleigh and staffed by designated employees in his office,

to serve all magistrates and divisions within the district. The Bureau is authorized and empowered to perform all functions prescribed for the Central Violations Bureau by Section XVI, Disposition of Petty Offense, Operations Manual for United States Magistrates, dated January, 1971.

8. *Violation Notices*

In both mandatory and voluntary court appearance cases, the law-enforcement officer shall transmit copies 1 and 2 of the Violation Notice to the Central Violations Bureau, Clerk, U. S. District Court, P. O. Box 25670, Raleigh, North Carolina, 27611, within 24 hours. The officer keeps copy 3 for his agency files and copy 4 is given to the alleged violator. In voluntary court appearance cases the alleged violator may indicate on copy 4 that he wishes to have a hearing, and mail copy 4 to the Central Violations Bureau. The Central Violations Bureau will determine which magistrate is to conduct the hearing, based upon: (a) instructions from the court; (b) agreed upon arrangements with the magistrates; (c) the place where the violation occurred; (d) the availability to the magistrates of a reporter or sound recording equipment; and (e) the convenience of the alleged violator. The Central Violations Bureau will send the designated magistrate a list of scheduled appearance which will serve as the magistrate's calendar. The magistrate shall notify the alleged violator, the officer, and any other necessary persons the date, time and place of the hearing.

9. *Reference of a Minor Offense Case to a Magistrate*

(a) *Information Filed in the District.* Where an information charging a minor offense is pending in this court, the clerk is authorized and directed to refer the case immediately to a magistrate to be designated by the clerk based upon: (a) instructions from the court; (b) agreed-upon arrangements with the magistrates; (c) the place where the alleged offense occurred; (d) the availability to the magistrate of a reporter or sound recording equipment; and (e) the convenience of the defendant. The designated magistrate shall proceed in the manner prescribed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

(b) *Transfer Under Rule 20 of the Federal Rules of Criminal Procedure.* Upon the transfer, under Rule 20 of the Federal Rules of Criminal Procedure, of an information or indictment charging a minor offense, the clerk is authorized and directed to refer the case immediately to a magistrate to be designated by the clerk as prescribed in subsection (a). The designated magistrate shall proceed in the manner prescribed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

10. *Additional Duties Assigned to the Full-Time Magistrate(s)*

(a) *Criminal Procedure.*

1. General supervision of the criminal calendar, including calendar calls and motions to expedite or postpone the trial of cases.

2. Conduct pre-trial conferences, omnibus hearings, and related proceedings.

3. Hear procedural and discovery motions, including motions for the suppression of evidence, and the conduct of necessary hearings thereon.

4. Conduct post-indictment arraignments, acceptance of not guilty pleas, and may order a presentence report on a defendant who signifies the desire to plead guilty.

5. Conduct preliminary hearings leading to the revocation of probation.

6. Submit written reports with recommendations to the court on all actions taken pursuant to this subsection (a) of paragraph 10.

Prisoner Petitions

7. Review habeas corpus petitions filed by state prisoners under 28 U.S.C. § 2254, issue orders to show cause and other necessary orders to obtain a complete record, and prepare a report and recommendation as to (1) the need for an evidentiary hearing and (2) the disposition of the petition.

8. Review habeas corpus petitions filed by federal prisoners for the correction or reduction of sentences under 28 U.S.C. § 2255 and prepare a report and recommendation to the district judge as to the disposition of the case. A petition of a federal prisoner shall not be referred to a magistrate if resolution of the issues requires a knowledge of the original trial proceedings or might result in overruling a prior determination of a district judge.

9. Review civil suits for the deprivation of rights under 42 U.S.C. § 1983 and prepare a report and recommendation to a district judge as to the defendant's eligibility to proceed *in forma pauperis* and the need for evidentiary proceedings; and submit a report recommending a disposition of the case.

10. Take on-site depositions, gather evidence, and serve as a mediator at the holding facility in connection with civil rights suits filed by prisoners contesting conditions of confinement under 42 U.S.C. § 1983.

11. Review prisoner correspondence.

(b) *Civil Proceedings.*

1. General supervision of the civil calendar, including the handling of calendar calls and motions to expedite or postpone the trial of cases.

2. Conduct preliminary and final pre-trial conferences, status calls and settlement conferences, and prepare a pre-trial order following the conclusion of the final pre-trial conference.

3. Hear and determine procedural and discovery motions, and conduct necessary hearings thereon.

4. Consider and make recommendations to the district court concerning motions for summary judgment and dismissal.

5. Accept jury returns in the absence or disability of the trial judge.

6. Conduct trials in civil cases by consent of all the parties. The stipulation of the parties in such cases should provide for the entry of judgment.

7. Enter default judgments in appropriate cases and the review of motions to set aside default judgments. Rule 55, F.R.Civ.P.

(c) *Special Master References.*

1. Hear testimony and submit a report and findings on complicated issues in jury cases or in matters of account difficult computations of damages and exceptional conditions in nonjury cases.

2. Supervise discovery in connection with special aspects of patent antitrust cases, especially where there are a great many issues, claims and documents, or in multiple disaster and class action cases where there are numerous claimants and diverse claims.

3. Serve as a commissioner to determine compensation and assess damages in land condemnation cases under Rule 71A(h), F.R.Civ.P.

4. Serve as a master for the assessment of damages in admiralty cases.

5. Conduct evidentiary hearings and prepare findings in employment discrimination cases under Title VII of the Civil Rights Act of 1964.

(d) *Judicial Review of Administrative Proceedings.*

1. In suits for judicial review of final decisions of administrative agencies, reviewing the record of administrative proceedings.

A magistrate is authorized to submit a report to the district judge summarizing the administrative record and concluding (1) whether there are defects in the agency proceedings which rise to the level of a deprivation of due process; (2) whether there should be a remand to the agency for additional factual determinations to complete the record; and (3) whether there is substantial evidence in the record to support the ultimate decision of the agency.

(e) *Miscellaneous Duties.*

1. Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act and submit recommendations to the court.

2. Prepare subpoenas and writs of habeas corpus ad testificandum and habeas corpus ad prosequendum for issuance by the court.

3. Examine judgment debtors.

4. Coordinate the court's efforts in such fields as the promulgation of local rules and procedures and the administration of the forfeiture of collateral system.

5. Impose civil fines and penalties under the Federal Boat Safety Act.

6. Issue orders prior to ratification of sale in mortgage foreclosure proceedings on properties financed through government loans (Veterans Administration and Federal Housing Administration).

7. Supervise proceedings on requests for letters rogatory in civil and criminal cases, upon special designation by the district court.

8. Conduct inquests on damages in cases involving default judgments.

9. Process complaints and issue appropriate summonses or arrest warrants for the named defendants. Rule 4, F.R.Crim.P.

10. Issue search warrants upon a determination that probable cause for the warrant exists. Rule 41, F.R.Crim.P.

11. Conduct initial appearance proceedings for defendants, informing them of their rights, admitting them to bail and imposing conditions of release. Rule 5, F.R.Crim.P., and 18 U.S.C. § 3146.

12. Appoint attorneys for indigent defendants, together with the administration of the court's Criminal Justice Act plan, the maintenance of a register of eligible attorneys, and the approval of attorneys' expense vouchers. 18 U.S.C. § 3006A.

13. Conduct full preliminary examinations. Rule 5.1, F.R.Crim.P., and 18 U.S.C. § 3060.

14. Conduct removal hearings for defendants charged in other districts; and are specially designated and authorized to issue a warrant of removal under Rule 40, F.R.Crim.P.

15. Administer oaths and take bail, acknowledgments, affidavits and depositions. 28 U.S.C. § 636(a)(2).

16. Set bail for material witnesses. 18 U.S.C. § 3149.

17. Upon special designation by the district court, conduct extradition proceedings. 18 U.S.C. § 3184.

18. Hold to security of the peace and for good behavior. 18 U.S.C. § 3043.

19. Discharge indigent prisoners or persons imprisoned for debt under process or execution issued by a federal court. 18 U.S.C. § 3569 and 28 U.S.C. § 2007.

20. Issue an attachment or order to enforce obedience to an Internal Revenue Service summons to produce records or give testimony. 26 U.S.C. § 7604(b).

21. Institute proceedings against persons violating certain civil rights statutes. 42 U.S.C. § 1987.

22. Settle or certify the nonpayment of seamen's wages. 46 U.S.C. § 603.

23. Enforce awards of foreign consuls in differences between captains and crews of vessels of the consul's nation. 22 U.S.C. § 258(a).

24. Try and sentence defendants in minor offense cases by consent of the defendants. 18 U.S.C. § 3401.

Any party aggrieved by a magistrate's ruling or determination made pursuant to these amendments to Rule 19 shall be entitled to a hearing before a district judge to the same extent as if the district judge were hearing the matter initially.

11. *United States Court Reporters*

It shall be unlawful to molest, handle, tamper with, or move any equipment, supplies, instruments, documents, machines, speakers, mikes, or any related equipment, supplies or documents, in any manner, belonging to, or in the care, custody and/or control of the official United States court reporter and used in the courtrooms, court chambers or the United States court reporter offices, without the express permission of the United States court reporters or the United States district judges.

Any violation of the foregoing rule shall be punishable as for contempt of the United States court.

Editor's Note. — This rule was adopted by order dated Jan. 26, 1971, and made effective May 1, 1971.

The amendment adopted March 25, 1971 added subdivisions 7 and 8.

The first amendment adopted April 15, 1971 added subdivision 9.

The second amendment adopted April 15, 1971 added to subdivision 6 the schedules headed "General Services Administration Violations" and headed "General Services Administration Violations — Mandatory Appearance Violations."

The amendment adopted Sept. 3, 1973, added subsection (c) of subdivision 4.

The amendment adopted Aug. 15, 1974, added to subdivision 6 the schedule headed "Veterans Administration Facilities Violations."

The amendment adopted Oct. 31, 1975, effective Nov. 1, 1975, added the last item in the schedule headed "National Park Service Violations" in subdivision 6.

The amendment adopted Oct. 17, 1975, added subdivision 10.

The amendment effective Feb. 16, 1976, added subsection (d) to subdivision 4.

The amendment effective Aug. 1, 1976, adopted July 20, 1976, rewrote the schedule in subdivision 6.

The amendment adopted March 18, 1976, inserted "and make recommendations to the district court concerning" in subsection (b)4 of subdivision 10.

The amendment adopted Aug. 31, 1976, added subdivision (11).

The amendment adopted Jan. 24 and 25, 1979, made changes in the schedule in subdivision 6.

G.S. 20-140.1, referred to under "Mandatory Appearance Violations" in subdivision 6, was repealed by Session Laws 1973, c. 1330, s. 39.

Rule 20. [Forms.]

FORM 1: INSTRUCTIONS FOR FILING A COMPLAINT BY A STATE PRISONER UNDER THE CIVIL RIGHTS ACT, 42 UNITED STATES CODE SECTION 1983.

This packet contains four (4) copies of a complaint form and two (2) copies of a *forma pauperis* petition. To start an action you **MUST** file an original and one copy of your complaint for **EACH** defendant you name and one copy for the Court. For example, if you name two defendants you must file an original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. If you should name more than two defendants, additional copies of the complaint forms will be made available to you. *All copies of the complaint must be identical to the original.*

The Clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this Court only if one or more of the named defendants is located within this District. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

You are required to furnish, so that the United States Marshal can complete service, *the correct name and address of each person you have named as a defendant*. A PLAINTIFF IS REQUIRED TO GIVE INFORMATION TO THE UNITED STATES MARSHAL TO COMPLETE SERVICE OF THE COMPLAINT UPON ALL PERSONS NAMED AS DEFENDANTS.

In order for this complaint to be filed, it must be accompanied by the filing fee of 15 dollars (15.00). In addition, the United States Marshal will require you to pay the cost of serving the complaint upon each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the Court to proceed *in forma pauperis*. One copy should be filed with your complaint; the other copy is for your records.

You will note that you are required to give facts. ***THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.***

When these forms are completed, mail the original and the copies to the Clerk of the United States District Court for the Eastern District of North Carolina, Post Office Box 25670, Raleigh, North Carolina, 27611.

FORM 2: FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No.....-CRT
(leave this space blank)

(enter the full name of the
plaintiff or plaintiffs in
this action ABOVE)
versus

(enter the full name of the
defendant of [or] defendants in
this action)

I. HAVE YOU BEGUN OTHER LAWSUITS IN FEDERAL COURT DEALING WITH THE SAME FACTS INVOLVED IN THIS ACTION?

Yes ()

No ()

IF YOUR ANSWER IS **YES**, DESCRIBE THE FORMER LAWSUIT IN THE SPACE PROVIDED BELOW:

II. PLACE OF PRESENT CONFINEMENT

(give name and address of place of current confinement)

III. PARTIES

(In Item "A" below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff

Address

(In Item "B" below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item "C" for the names, positions, and places of employment of any additional defendants.)

B. Defendant is employed as a
at

C. Additional Defendants

IV. STATEMENT OF CLAIM

(State here as briefly as possible the *FACTS* of your case. Describe how each defendant is involved. Include also the names of other persons

involved, dates, and places. *DO NOT GIVE ANY LEGAL CITATIONS OR ANY LEGAL ARGUMENTS OR CITE ANY STATUTES.* If you intend to allege a number of related claims, number and set forth each claim in a SEPARATE paragraph. Use as much space as you need. Attach extra sheets if necessary.)

.....

.....

.....

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.....

V. RELIEF SOUGHT BY PRISONER
(State briefly EXACTLY what you want the Court to do for you. MAKE NO LEGAL ARGUMENTS, DO NOT CITE CASES OR STATUTES.)

.....

.....

.....

.....

Signed this day of, 19.....

(Signature of the Plaintiff)
(other signatures of other plaintiffs
if necessary)

I declare under penalty of perjury that the foregoing is true and correct.

DATE (Signature of Plaintiff)
(signatures of other plaintiffs
if necessary)

FORM 3:
**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION**
NO.-CRT

.....
(name of Plaintiff)
versus
(Name of defendant)

} **DECLARATION IN SUPPORT OF
REQUEST TO PROCEED IN
FORMA PAUPERIS**

.....

I, ..., am the plaintiff in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. Are you presently employed? Yes. No.
A. If the answer is yes, state the amount of your salary per month and give the name of your employer, or the division in which you have employment . .

.....

B. If the answer is no, state the date of your last employment and the amount of the salary per month which you received.

2. Have you received within the past twelve (12) months any money from any of the following sources?

A. Business, profession, or form of self-employment:

Yes No

B. Rent payments, interest, or dividends? Yes No

C. Pensions, annuities, or life insurance payments:

Yes No

D. Gifts or inheritances: Yes No

E. Any other sources: Yes No

If the answer to any of the above is YES, describe each source of money and state the amount received from each during the past twelve (12) months.

FORM 4:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. CRT

Plaintiff

versus

Defendant

ORDER

PLAINTIFF, ..., a prisoner at the, has submitted a complaint for filing in this District, together with a request for leave to proceed *in forma pauperis*. Since it appears that he is unable to pay the costs for commencement of suit, the following ORDER is entered this day of, 19. . . . :

IT IS HEREBY ORDERED that Plaintiff's MOTION to proceed *in forma pauperis* is GRANTED and the Clerk is directed to file the Complaint.

3. Do you own cash or do you have money in a checking or savings account? Yes No (Include any funds in prison accounts, if any)

If the answer is YES, state the total value owned.

Include with this petition, attached to this form, a statement of the balance of your prison trust account balance.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes No

If the answer is YES, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support; state your relationship to those persons; and indicate how much you contribute toward their support.

I UNDERSTAND THAT A FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS DECLARATION WILL SUBJECT ME TO PENALTIES FOR PERJURY.

(Signature of Plaintiff)

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this day of , 19....

.....
(Signature of Plaintiff)

IT IS FURTHER ORDERED that Plaintiff shall serve upon defendant or, if appearance is entered by counsel for defendant, upon his attorney, a copy of every further pleading or other document for consideration by the Court. He shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to the defendant or his counsel. Any paper received by a District Judge or Magistrate which has not been filed with the Clerk or which fails to include a certificate of service will be DISREGARDED BY THIS COURT.

.....
UNITED STATES DISTRICT JUDGE
or
UNITED STATES MAGISTRATE

FORM 5:

.....
(date)

Mr.
(name of plaintiff)

.....
(address of plaintiff)

Dear Mr.:
Judge (Magistrate) received your communication of
..., 19.... However, it is improper for you to communicate directly with judges or magistrates about cases pending before them. Accordingly, your communication is returned herewith.

When you wish to provide information relevant to your case, you MUST mail the paper to the Clerk of Court, *Post Office Box 25670, Raleigh, North Carolina, 27611*, who will then forward it to the appropriate Judge or Magistrate.

You must also mail a copy of the paper to each defendant or, if they are represented by counsel, to their attorneys, and include on the original paper filed with the Clerk of Court a certificate stating the date on which you mailed a true and correct copy to each defendant or his attorney.

Very Truly Yours,
Clerk of Court

by:

Editor's Note. — This rule was adopted by order dated Jan. 11, 1978.

The order adding this rule provides: "... that the Clerk shall implement these additions to the Local General Rules of the United States

District Court for the Eastern District of North Carolina in such a manner as will result in a speedy transition to full utilization of this forms system; said transition is to be fully completed by June 1, 1978."

II. Civil Rules

Rule 2. Filing Fee and Security for Costs

A. Initiating Civil Actions. The parties instituting any civil action, suit or proceeding in this court, whether by original process, removal or otherwise, shall pay a filing fee of \$15, except that on application for a writ of habeas corpus the filing fee shall be \$5. 28 U.S.C. § 1914. Prepayment of fees or costs or security therefor shall not be required in seamen's suits. 28 U.S.C. § 1916.

B. Bond for Costs. The parties instituting any civil action, suit or proceeding in this court shall not be required to post a bond or cash deposit as security for costs, except: (1) upon issuance of a restraining order or preliminary injunction as required by Rule 65(c), F.R. Civ. P.; (2) in petitions for removal of civil actions from state court as required by 28 U.S.C. § 1446(d); (3) in Admiralty and Maritime actions as authorized by Rule E(b) and Rule F(1); and (4) when express provision is made therefor either in a statute of the United States or in the Civil, Appellate, or Supplemental Rules of Federal Procedure.

Editor's Note. — The amendment adopted Jan. 2, 1974, rewrote this rule.

Rule 3. Filing of Papers and Service

E. Pro se Civil Actions by Persons in State or Federal Custody.

1. In all *pro se* civil actions by persons in state or federal custody, other than proceedings under 28 U.S.C. §§ 2241 through 2255, (See, Gen. Rule 18 D, U.S. Dist. Ct., E.D.N.C.), the plaintiff shall file with the clerk one copy of the complaint, including all exhibits and other attachments, for each defendant, in addition to the original and one copy required by subsection A of this rule.

2. Where the person in state or federal custody seeks leave to proceed *in forma pauperis*, he shall submit an affidavit setting forth information which establishes that he is unable to pay the fee and costs of the action, and shall attach to the complaint a statement from prison officials showing the amount of money in plaintiff's prison trust fund account.

Editor's Note. — The amendment adopted Aug. 12, 1974, added section E.

As the rest of the rule was not changed by the amendment, only section E is set out.

IV. Rules in Bankruptcy

Rule 15. Chapter X Bankruptcy Cases

The Clerk of the United States District Court for the Eastern District of North Carolina, or his authorized deputies, shall refer all Chapter X cases forthwith to the referee in bankruptcy for this district as bankruptcy judge.

After the reference of a Chapter X case, all proceedings in the case shall be heard before the referee except as otherwise provided by subdivision (b) of Rule 10-103 of the Chapter X Rule, by Bankruptcy Rule 920, by Section 2(a)(15) of the Bankruptcy Act when a complaint seeks an injunction to restrain a Court, by Section 43c of the Act when the office of the referee is vacant, and by the provisions in the Act and Part VIII of the Bankruptcy Rules governing appeals from judgments of the referee.

Editor's Note. — This rule was adopted Aug. 30, 1975.

VI. Local Rules for Admiralty and Maritime Claims

Rule 1. Title and Scope

(A) The title of these rules is "Local Rules for Admiralty and Maritime Claims in the United States District Court, Eastern District of North Carolina."

(B) These rules apply to admiralty and maritime claims within the meaning and contemplation of Rule 9(h) of the Federal Rules of Civil Procedure and remedies within Supplemental Rule A of the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, unless inconsistent therewith. The general local rules are also applicable unless inconsistent herewith.

Editor's Note. — The Local Rules for Admiralty and Maritime Claims, Rules 1-15, were adopted by order of Dec. 23, 1976, effective Jan. 1, 1977. The same order rescinded the former Supplemental Rules for Certain Admiralty and Maritime Claims, Rules 1-25.

Rule 2. Process: Return Thereof

(A) All process shall be issued by the clerk without order, except suits prosecuted in forma pauperis sought to be filed without prepayment of fees or costs or without security.

(B) Unless otherwise ordered by the court all process from this court within the scope of Supplemental Rules C and D shall be returnable (1) by claim within ten days after execution of the process and by motion or answer within twenty days following claim, or (2) both claim and motion or answer within thirty days following execution of the process.

(C) Unless otherwise ordered by the court, Rule 9(h) process from this court in personam shall be by civil summons returnable twenty days after service of the process except process within the contemplation of Supplemental Rule B which shall be in conformity therewith.

(D) Whenever a vessel is to be served, the party seeking service shall inform the marshal of the registry of the vessel to be served. Provided, however, failure to so inform the marshal shall not be cause for the marshal to refuse to serve the said vessel or in any way invalidate service of said vessel.

Rule 3. Publication

(A) Publication required by Supplemental Rule C(4) shall be made once, without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Washington Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina
The News and Observer, Raleigh, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(B) If the property arrested is not released within ten days after execution of process, publication hereunder shall, unless otherwise ordered, be caused by the plaintiff or intervenor to be made within seventeen days after execution of process.

(C) Such notice shall be substantially as follows, except and unless otherwise provided in actions for the enforcement of forfeitures for violation of any statute of the United States:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Caption of Case

NOTICE: The United States Marshal, Eastern District of North Carolina, has arrested the [(Vessel and appurtenances) (property)] in the above causes, civil and maritime for [nature of claim, i.e. contract, salvage, damage, collision, foreclosure of preferred mortgage, etc.] amounting to [\$ (and nature of unliquidated items)]. Process returnable on [month, day and year, i.e. 30 days following execution of process as measured by Rule 6(a), Federal Rules of Civil Procedure] at the (name of courthouse), (city), (state), and any person claiming any interest therein must appear no later than that date and file written claims, answer or other defense, in person, or by attorney, or default and condemnation will be ordered.

DATED at [city of publication], (state), [month, day and year of publication].

[Name]

[Address]

Attorney(s) for [(Plaintiff) (Intervenor)]

(D) Plaintiff or intervenor will cause to be furnished to the marshal of this court, at the time process issues in Supplemental Rule B, C and D actions, a prepared statement of attachment and garnishment or arrest with blanks for completion of date thereof and for signature below the name and title of such marshal, together with self-addressed envelope to plaintiff or plaintiff's attorney with sufficient postage affixed. The marshal of this court will promptly cause same to be completed and mailed after execution of process.

(E) Plaintiff shall effect publication required by Supplemental Rule F(4), without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Washington Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina
The News and Observer, Raleigh, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(F) Whenever publication is required by Supplemental Rules C(4) and F(4), plaintiff or intervenor will cause to be filed with the clerk, not later than the return date, sworn proof of publication by or on behalf of the publisher or the editor in charge of legal notices of the newspaper in which published, together with a copy of the proof of publication, or publication or reproduction thereof.

Rule 4. Notice of Sale, Publication of

Notice of sale of property in suits in rem and quasi in rem, except in suits on behalf of the United States where other notice is prescribed by statute, shall be caused by the marshal to be published in any one of the newspapers set forth in Rule 3(a) of these Local Rules and published at least twice, the first publication to be at least one calendar week prior to date of sale and the second publication to be at least three calendar days prior to date of sale, unless otherwise ordered by the court.

Rule 5. Costs and Security, Stipulations for

(A) In actions where there is sought, in whole or in part, a remedy listed in Supplemental Rule A of the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, no initial pleading seeking such remedy, or claim pursuant to Supplemental Rule F(5), shall be filed unless the party offering the same shall first file a stipulation for costs in the sum of \$250.00, or in case two or more vessels are jointly or severally proceeded against, a sum equal to \$500.00 per vessel, conditioned that the principal shall pay all costs and expenses awarded against him by any interlocutory order or final judgment, or on appeal. In all other admiralty and maritime actions, no initial complaint, whether original or interlocutory, shall be filed by any party, unless the party offering the same shall first file a stipulation for costs in the sum of \$100.00, conditioned that the principal shall pay all costs and expenses awarded against him by any interlocutory order or final judgment, or on appeal. All stipulations shall be with at least one surety resident in the Eastern District of North Carolina. Any incorporated surety company duly authorized to do business in the Eastern District of North Carolina may be accepted as such surety. In the place of the stipulation for costs with surety, a party may deposit the necessary amount in the registry of the court accompanied by a statement conditioned as above, referring to such deposited amount.

(B) Seamen suing as provided in 28 U.S.C. § 1916 shall not be required to file a stipulation for costs in the first instance. The court may however, order a stipulation to be given at any time.

(C) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater, better or lesser security; and any such order may be enforced by attachment or otherwise.

(D) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater or better costs security; and any such order may be enforced by attachment or otherwise. The court may enter such order on its own motion, with or without notice.

(E) In all actions in rem brought by seamen in their own names and for their own benefit for wages, salvage, or the enforcement of laws for their health or safety without prepaying costs or fees or furnishing security therefor, pursuant to 28 U.S.C. § 1916, the marshal may at any time after service of process, attachment, or seizure of a vessel, petition any judge or magistrate of this court to require the posting of security for any or all reasonable expenses which have been or may be incurred while the vessel is in the custody of the marshal. Upon filing such petition for the posting of security, a hearing date shall promptly be set by the court and the marshal shall give notice of the time and place of such hearing by serving a copy of the notice of hearing together with a copy of the petition upon counsel of record for the parties or upon the parties, and by posting a copy of same on the vessel.

Rule 6. Stipulations, Form of

Except in cases instituted by the United States by information, or complaint of information upon seizures for any breach of the revenue, navigation, or other laws of the United States, stipulations or bonds in admiralty and maritime actions need not be under seal and may be executed by the agent or attorney of the stipulator or obligor. Stipulations for costs with corporate surety need not be signed or executed by the party, but may be signed by its agent or attorney, and shall be sufficient in any event if executed only by the surety approved by the court.

Rule 7. Pleadings and Parties

(A) Every complaint filed as a Rule 9(h) action shall set forth "In Admiralty" following the designation of the court, in addition to the statement, if any, contained in the body of the complaint pursuant to such rule.

(B) In actions under Supplemental Rules B, C, or D, the plaintiff's attorney or the plaintiff, if he has no attorney, shall include his business telephone number in addition to his address.

(C) Every complaint in Supplemental Rules B and C actions shall state the amount of the debt, damages, or salvage for which the action is brought, and shall include in addition thereto the amount of any claim for unliquidated items claimed, including attorneys fees.

(D) In cases of salvage, the complaint shall also state to the extent known or estimate the value of the hull, cargo, freight and other property salvaged, the amount claimed, the names of the principal salvors, and that the suit is instituted in their behalf and in behalf of all other persons interested or associated with them. There shall also be attached to the complaint a list of all known salvors and all persons believed entitled to share in the salvage, and also any agreement of consortium available and known to exist among them or any of them, including a copy of any such agreement.

Rule 8. Verification of Pleadings and Answers to Interrogatories

Every complaint and claim in Supplemental Rules B, C and D actions shall be verified on oath or solemn affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a

complaint, claim or answers to interrogatories may be made by an agent, attorney-in-fact or attorney of record, who shall state briefly the sources of this knowledge, information and belief, declare that the document affirmed is true to the best of his knowledge, information and belief, state the reason why verification is not made by the party or a corporate officer, and that he is authorized so to act. Any such verification will be deemed to have been made by the party to whom a document might apply as if verified personally. Any interested party may move the court, with or without a request for stay, for the personal oath of a party or all parties, or that of a corporate officer. If required by the court, such verification shall be procured by commission or as otherwise ordered.

Rule 9. Intervention

(A) Whenever a vessel or other property is seized, attached or arrested in a proceeding and said property is in the hands of the marshal, anyone having a claim against the vessel or property is required to present the same by intervening complaint filed in the case and not by way of original complaint, unless otherwise ordered by the court. Upon the filing of each such intervening complaint the clerk [or, counsel who files same] shall forthwith deliver a conformed copy thereof to the marshal who shall thereupon post such copy on the vessel or property, but the marshal need not re-arrest or re-attach the vessel or property. Counsel for intervening parties are required to ascertain the names and addresses of other counsel of record in the proceedings at the time of the filing of an intervening complaint and forthwith to serve a copy of the intervening complaint, including any exhibits attached to the original thereof, upon such other counsel and shall thereafter file a certificate with the clerk setting forth the names and addresses of counsel served, method of service and the date thereof.

(B) Subject to other rules of this court, any party is permitted to intervene without the filing of a motion or petition to intervene in any proceeding filed pursuant to Rule 9(h) of the Federal Rules of Civil Procedure where a vessel or other property has been arrested or attached and is in the hands of the marshal, except that no party is permitted to intervene in any such proceeding without first obtaining leave of court if intervention is sought within fifteen days prior to the date for which a sale of the vessel or property has been set by the court.

If intervention is sought within said fifteen-day period by any party, that party is required to file a motion or petition to intervene and to serve copies thereof along with any exhibits or documents relied upon in support of such intervenors' claims and request for intervention, upon all counsel of record. In such circumstances the court may allow intervention upon such terms and conditions which it considers equitable to the interests of all parties involved.

(C) Following an initial attachment, arrest or seizure any party intervening in a proceeding alleging a claim against the property is required to deposit funds for the safekeeping of the property with the marshal upon the filing of such intervening claim or complaint. Unless the court otherwise orders for good cause shown the deposit is to be in an amount determined by the marshal.

Rule 10. Appraisement and Appraisers and Other Matters

(A) Order for appraisement of property under arrest or attachment, or of plaintiff's interest in the vessel and pending freight under Supplemental Rule F(7), shall issue only upon motion and notice pursuant to Rule 7(b) or upon consent of the attorneys for the respective parties.

Before executing their trust, appraisers shall be sworn or affirmed to faithful discharge thereof before the clerk or his deputy. The appraisement shall be returned to the clerk's office and the clerk's office shall give notice of the return

to the parties or their attorneys. Any party, on notice, may appeal the appraisal instant to the court. After return of the appraisal the court, on notice and hearing, shall determine the value of the property under arrest or attachment or the value of plaintiff's interest in the vessel and pending freight.

For their services appraisers shall be paid fees, as ordered by the court, by the party at whose instance the appraisal was ordered. Appraiser's fees shall thereafter be taxed as the court orders.

(B) All other maritime procedures and remedies such as motions for appointment of substitute custodians and like matters are left to be handled by an originating motion pursuant to Rule 7(b), Federal Rules of Civil Procedure, on such notice as the exigencies of the circumstances may require.

Rule 11. Release of Seizures—Custodial Cost—General Bonds

(A) Property seized by the marshal may be released as follows:

- (1) By the marshal upon his receipt of security, accompanied by the endorsed express authorization for release signed by the party or his attorney as provided by Supplemental Rule E(5) (c) if all costs and charges of the court and its officers shall have first been paid. Moneys received as part of any cash stipulation shall be delivered to the clerk by the marshal for deposit in the registry of the court.
- (2) In an action entirely for a sum certain, by paying into the court the amount alleged in the complaint to be due, with interest at six percent per annum thereon from the date claimed to be due to a date twenty-four months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, claim of the property shall be filed.
- (3) In actions other than possessory, petitory, and partition, by filing, in addition to a claim of the property, an approved stipulation for the amount of the appraised or agreed value of the property seized, with interest (unless otherwise ordered by the court), conditioned to abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree rendered by this court or by any appellate court, with interest.
- (4) In possessory, petitory, and partition actions, only upon the order of the court, and on such security and terms as ordered.
- (5) Upon the dismissal or discontinuance of the action or upon the written consent of the attorney for the party on whose behalf the property is detained, if all costs and charges of the court and its officers shall have first been paid.

(B) The marshal shall not deliver any property so released until his costs and charges shall first have been paid.

(C) In any general bond as provided for by Supplemental Rule E(5) (b), the vessel will be identified by name, nationality, dimensions, official number or registration number, hailing port and port of documentation, to the extent applicable.

The owner of such vessel shall also file complete designated United States address for communications to the owner or designated agent, which shall be by mail.

Execution of process against the vessel so stayed under Supplemental Rule (5) (B) shall be endorsed to the marshal as stayed pursuant to that rule. Such process shall be served together with a copy of the complaint by the marshal on the master or other person in whose charge or custody the vessel is found and the marshal shall make his return thereof. If no master or other person in charge of custody is found aboard the vessel, the marshal shall so make his return accordingly, and the clerk shall advise by mail the owner or designated agent, at the address furnished pursuant to this rule, of the nature of the action, any

amount claimed, the plaintiff, the name and address of plaintiff's attorney, the case number, and the return day thirty days from the date of the marshal's attempt.

The clerk will maintain a current list of vessels subject to a general bond and file said bonds alphabetically by name of vessel and endorsed as provided by Supplemental Rule E(5) (b).

Rule 12. Taxation as Costs

If costs shall be awarded to either or any party, then the reasonable premium or expenses paid on all bonds or stipulations or other security by the party in whose favor such costs are allowed shall be taxed as a part of the costs of the case.

In addition thereto, if costs shall be awarded to either or any party, then the reasonable expenses paid by a party incidental to or arising out of the attachment or arrest of any property in the proceedings or while said property is "in custodia legis" shall be taxed as a part of the costs of the case.

Rule 13. Stay of Execution or of Release of Property After Judgment or Dismissal

No execution of judgment shall issue nor shall seized property be released pursuant to judgment or order of dismissal, until ten days after its entry. Upon the filing of a motion for new trial or notice of appeal or motion to set aside default within said ten-day period, a further stay shall exist for a period not to exceed thirty days from the entry of judgment or dismissal to permit the entry of an order fixing the amount of a supersedeas bond and the filing of same.

Rule 14. Possessory Actions—Short Day Return

In all possessory actions upon special order of the court, process may be made returnable upon a short day. The answer shall be filed within such time as may be specifically ordered by the court, and a day of hearing then fixed, unless otherwise ordered. The hearing of possessory suits shall be given preference.

Rule 15. Claims After Sale, How Limited

Claims upon the proceeds of sale of property under a final decree, except for seamen's wages, will not be admitted in behalf of lienors who file their claims after the sale, to the prejudice of lienors who filed their claims before the sale, but shall be limited to remnants and surplus, unless for cause shown it shall be otherwise ordered.

Rules 16-25.

[Rescinded.]

Editor's Note. — These rules were rescinded by order effective Jan. 1, 1977, adopted Dec. 23, 1976, which adopted Section VI. Local Rules for Admiralty and Maritime Claims, Rules 1-15 in their place.

The United States District Court for the Western District of North Carolina

Rules of Court

I. General Rules

Rule

2. Sessions.

11. Fair Trial and Free Press in Criminal Cases.

12. Forfeiture of Collateral Security in Lieu of Appearance.

Sessions of Grand Jury.

Regular Terms for Trial of Criminal Cases.

Rule

Additional Duties of Magistrate.

Rule for Custody and Disposition of Models, Exhibits, and Depositions.

II. Bankruptcy Rules

23. Automatic Reference of Chapter X Bankruptcy Cases.

I. General Rules

Rule 2. Sessions.

The court shall be in continuous session in all divisions of the district, and all matters, criminal and civil, shall be subject to being called for hearing and trial at any time upon reasonable notice to the parties.

Regular terms for the disposition of criminal cases shall be as follows:

Charlotte Division:

First Monday, January, April, July and October

Statesville Division:

Third Monday, January, April, July and October

Asheville Division:

First Monday, February, May, August and November

Shelby Division (Rutherfordton):

Fourth Monday, February, May, August and November

Bryson City Division:

Second Monday, March, June, September and December

(When the first day of any scheduled term falls on a legal holiday, court will convene the following day.)

Additional criminal sessions will be scheduled from time to time in all divisions as may be required to dispose of the criminal dockets promptly.

Trial calendars in civil cases will be prepared by the court, usually at the time of the Motion, Pre-trial and Settlement conference, or soon thereafter. Civil sessions of court will be held as often as necessary to accomplish, insofar as possible and except in the unusual cases, the following *illustrative* schedule of disposition of cases.

(a) In the unusual case where *both* sides press for trial and *both* counsel are diligent in preparation — not more, and usually less, than six months should elapse between filing of complaint and trial.

(b) When *one* side presses for an early trial, the time lapse from filing complaint to trial should not exceed nine months.

(c) Where neither side presses for an early trial, the time lapse from filing complaint to trial should not exceed fifteen months.

(d) If any case becomes two years old — regardless of its difficulty — it will be treated as a judicial emergency, unless, for good cause, an order is entered putting the case on the inactive docket.

If necessary to promote the efficient administration of justice, all hearings and trials of civil cases may be transferred from any division to any other division within the district. With the consent of the parties, the judges may conduct hearings and trials at any place within the district.

Editor's Note. — The amendment adopted Aug. 12, 1971, rewrote the second paragraph. As to the Charlotte and Statesville Divisions, the amendment was made effective Jan. 1, 1972.

The amendment adopted Mar. 12, 1973, again rewrote the second paragraph. In addition to changing the dates of the terms and providing

for additional terms, the amendment added the sentence in parentheses at the end of the paragraph.

An order adopted Mar. 14, 1973, provides for additional sessions of grand juries to pass upon indictments for the new criminal terms.

Rule 11. Fair Trial and Free Press in Criminal Cases.

A. It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

B. All courthouse personnel, including among others, marshals, deputy marshals, court clerks, bailiffs, and court reporters shall not disclose to any person, without authorization by the court, information concerning arguments and hearings in criminal cases held in chambers or otherwise outside the presence of the public, or disclose any other information relating to a pending criminal case that is not a part of the public records of this court.

C. In a widely publicized or sensational case, the court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order.

Editor's Note. — This rule was adopted by order dated April 29, 1969.

Rule 12. Forfeiture of Collateral Security in Lieu of Appearance.

Pursuant to Rule 9, Rules of Procedure, United States magistrates, in the interest of justice, good court administration, and sound law enforcement, for the petty offenses listed below, whether originating under the applicable federal statutes or regulations or applicable state statute by virtue of the Assimilated Crimes Act, 18 U.S.C. § 13, occurring within the territorial jurisdiction of the United States magistrate, collateral may be posted in lieu of the appearance of the offender unless (1) the offense is denominated as one for which appearance is mandatory, or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States magistrate for trial of the offense or offenses listed below, except those offenses denominated "mandatory appearance", and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any applicable traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

There shall be maintained in the office of the clerk, and with each United States magistrate, a current list of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may be posted in lieu of appearance by the person charged with the said offense are as follows:

NATIONAL PARK SERVICE VIOLATIONS

Title 36, Chapter I, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
2.1(a)	Abandonment of vehicle or other property	\$ 25.00
2.1(b)	Unauthorized leaving of vehicle or other property unattended more than 24 hours	25.00
2.2	Unauthorized or prohibited use of aircraft, and parachute deliveries, except in emergencies	25.00
2.3(a)	Prohibited use of an audio or noise-producing device	25.00
2.3(b)	Unauthorized use of public address system	25.00
2.3(c)	Unauthorized installation of aerials and other special radio, telephone, and television equipment	25.00
2.4	Begging; hitchhiking; soliciting without permit	25.00
2.5	Unauthorized camping; violation of camping regulations	25.00
2.6	Failure to abide by posted signs regarding closed areas and visiting hours	25.00
2.8(a) (b) (c)	Failure to restrain or keeping dogs, cats, and other pets in place where prohibited	25.00
2.9(b)	Unauthorized use or possession of fireworks and firecrackers	15.00
2.10	Giving false report regarding accident or law violation	25.00
2.11	Unauthorized possession of firearms, traps, seines, weapons for destroying animal life	25.00
2.12(a) (c)	Unauthorized or unsafe kindling of fire; leaving fire not completely extinguished or unattended	25.00
2.13(a)	Violation of any fishing laws and regulations of State or legal subdivision	25.00
2.13(c-k)	Violation of general fishing regulations	25.00
2.16(c)	Possession of intoxicants by minors	25.00
2.17	Failure of finder to turn in lost articles	15.00
2.18	Unauthorized picnicking	15.00
2.19	Unauthorized operation or use of portable engine or motor driven equipment	25.00
2.20	Minor violations (such as flower picking) of regulations for preservation of public property, natural features, curiosities, and resources . . .	15.00
2.21	Holding public meeting, assembly, gathering, demonstration, or parade without permit or in violation of conditions stated therein	50.00
2.22	Failure to report incidents resulting in personal injury or property damage	25.00
2.23	Use of horses and other saddle or pack animals at places or in manner not permitted by regulations	25.00
2.24	Disposal of garbage, waste, and rubbish, and other conduct in violation of sanitary regulations	25.00
2.25	Collecting scientific specimens without permit	25.00
2.26	Use of roller skates and skateboards except in places designated by signs	25.00
2.27	Conducting sports events, entertainment and other public spectator attractions without permit or in violation of conditions in permit . .	25.00

Section Number	Offense	Collateral
2.28	Swimming, bathing, and use of certain water sports equipment where prohibited	\$ 25.00
2.29	Tampering with personal property not under one's lawful control without theft or damage	50.00
2.30	Travel on national scenic trails by use of prohibited vehicles or by horseback when trails closed	50.00
2.31	Water skiing where prohibited or in violation of regulations	25.00
2.32(a) (2)	Feeding or molesting wildlife	25.00
2.33	Engaging in winter sports activity where prohibited	25.00
2.34	Violation of regulations governing use of snowmobiles	25.00
2.39(d) (1-4)	Sale and distribution of printed matter in other than designated areas	25.00
2.39(h)	Sale or distribution of printed matter without a permit, or in violation of terms or conditions of a permit is prohibited	25.00
4.1	State Laws applicable:	
	Improper passing	20.00
	Failure to dim lights	25.00
	Illegal transportation one (1) quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle	25.00
	Violation of required lighting statutes	15.00
	Failure to yield right of way	30.00
	Obstructed windshield	15.00
	Exceeding safe speed	25.00
	Failure to slow to avoid collision	25.00
	Unsafe tires	15.00
	Expired inspection sticker	15.00
4.3	Violation of regulations governing use of bicycles	25.00
4.4	Failure to give notice of commercial towing service	25.00
4.5	Driving or permitting another to drive vehicle without license, and failure to display license upon request by authorized person	40.00
4.7	Entering or leaving park by vehicle at other than established places and designated hours	25.00
4.8	Excessive acceleration of motor vehicle engine when stopped or approaching or leaving stopping place	25.00
4.9	Making false report to authorized investigator of accident or violation.	25.00
4.10	Following a vehicle closer than is reasonable and prudent	15.00
4.11	Violation of vehicle load, weight, length, and width limitations	25.00
4.12	Use of defective muffler, muffler cut-out, or similar device	25.00
4.13(a)	Obstructing traffic by stopping or leaving vehicle unattended	50.00
4.13(b)	Obstructing traffic by improper driving	15.00
4.16	Failure to yield right-of-way	50.00
4.17	Exceeding speed limits:	
	1. 0-5 m.p.h. over applicable limit	15.00
	2. 6-10 m.p.h. over applicable limit	20.00
	3. 11-15 m.p.h. over applicable limit	25.00
	4. 16-20 m.p.h. over applicable limit	35.00
4.18(a)	Failure to comply with signs regulating parking	15.00
4.18(b)	Failure to comply with other traffic control signs	25.00
4.18(c)	Failure to obey order by authorized person directing traffic	50.00
4.19	Violation of regulation prohibiting use of motor vehicle outside established public roads or parking areas	25.00
4.20	Operation of unregistered vehicle without valid license plates; failure to display valid proof of ownership upon request of any authorized person	15.00
4.21	Operation of vehicle with unsafe brakes	25.00
5.1	Advertising within park area without permit	75.00
5.2	Sale of alcoholic beverages or intoxicants in violation of law	75.00
5.3	Unauthorized soliciting or engaging in business	25.00
5.5	Commercial photography, motion picture filming, and television or sound track production, without permit	100.00

Section Number	Offense	Collateral
5.6	Unauthorized use of commercial vehicles on government park area roads:	
	a. Pickup trucks, station wagons, vans and cars	\$ 25.00
	b. Trucks over one and one-half tons and semi-trailers	100.00
5.7	Constructing buildings or any public or private facilities without permit or agreement with United States	50.00
5.8	Discrimination in employment practices; failure to post notice	50.00
5.9	Discrimination in furnishing public accommodations and transportation services; failure to post notice	50.00
5.12	Installation of monument or memorial in park area without permission	25.00
5.13	Creation or maintenance of a nuisance within park area	25.00
5.14	Prospecting, mining, locating mining claims, and leasing in park areas, except as authorized by law	50.00
5.15	Residing in park areas without permit	50.00
5.16	Unauthorized use of park land for agricultural purposes or for grazing or herding of animals	50.00
6.5	Wrongful entry into areas or use of facilities without paying fee and obtaining permit when required	10.00
7.14(a)	Fishing within the Smoky Mountain National Park in violation of regulations as to places, times, bait, creel, and size limits	25.00
	Each fish in excess of creel limit	10.00
7.14(b) (1)	Possession of open beer or alcoholic beverages in undesignated areas	25.00
7.14(b) (2)	Possession of open beer or alcoholic beverages in motor vehicle in park areas	50.00
7.14(c)	Leave food, materials, containers, etc., not properly secured from wildlife	25.00
7.34(b)	Fishing within Blue Ridge Parkway area in violation of regulations as to places, times, bait, creel and size limits	25.00
	Each fish in excess of creel limit	10.00
7.34(d)	Unauthorized parking of vehicles and crossing and use of Blue Ridge Parkway by hunters	25.00
7.34(f)	Commercial hauling on Blue Ridge Parkway without special permit, or violation of restrictions in such permit	25.00
7.34(g)	Use of commercial passenger-carrying buses on Blue Ridge Parkway without special written permit	25.00
7.34(k)	Use of bicycles on Blue Ridge Parkway except on designated and posted trails	15.00
7.34(1)	Use of boats or vessels on waters of Blue Ridge Parkway	25.00

MANDATORY APPEARANCE VIOLATIONS

Section Number	Offense
2.7	Disorderly conduct
2.9(a)	Unauthorized use or possession of explosives
2.11	Unauthorized use of firearms, traps, and other weapons capable of destroying animal life
2.12(b) (d) (e) (f)	Unauthorized or unsafe kindling of fire and smoking where prohibited
2.14	Fraudulently obtaining food, lodging or other accommodations
2.15	Gambling; operation of gambling devices
2.16(a)	Intoxication in park area
2.16(b)	Sale of intoxicants to minors
2.20	Major violations of regulations for preservation of public property, natural features, curiosities, and resources
2.29	Tampering with or unlawful possession of personal property not under one's lawful control with result of theft or damage
2.32(a) (1) (b) (2) (c)	Hunting, trapping, capturing, or killing wildlife
2.37(b) (1) (2)	Delivery or possession of controlled substance, except as authorized by law

*Section
Number*

Offense

2.37(b) (3)
2.39(g)

Being in park area under influence of controlled substance
Persons engaged in sale or distribution of printed matter shall not obstruct or impede pedestrians or vehicles, harass park visitors with physical contact or persistent demands, misrepresent the purposes or affiliations of those engaged in the sale or distribution, or misrepresent whether the printed matter is available without cost or donation.

4.1

State Laws applicable:

1. Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing) G.S. 20-141.3
2. Passing stopped school, activity, or church bus
3. Illegal transportation of liquor (more than one quart)
4. Any violation of the Financial Responsibility Laws (Chapter 20, Articles 9A and 13)
5. Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire
6. Driving with false, forged or altered driver's license, or permitting an owned vehicle to be so operated. Driving while license suspended or revoked, or permitting . . . so operated (G.S. 20-28; G.S. 20-34)
7. Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates
8. Any violation resulting in personal injury
9. Any violation involving a false affidavit, or false statement under oath, or perjury (G.S. 20-17(5); G.S. 20-31; G.S. 20-313.1)

4.6

Driving under influence of intoxicants or drugs

4.14

Careless or reckless driving

4.15

Failure to report vehicle accident; leaving scene

4.17

Speeding 21 m.p.h. or more over applicable limit

All pleas of not guilty

All felonies

Any violation charged in the same warrant or summons with a mandatory appearance violation

NATIONAL FOREST SERVICE VIOLATIONS

Title 36, Chapter II, Code of Federal Regulations

*Section
Number*

Offense

Collateral

261.5(d)	Leave fire without completely extinguishing	\$ 25.00
261.6(a)	Unauthorized cutting, damaging, marking, or removing timber or other forest products	25.00
(Minor)		
261.6(b)	Cutting any standing tree, under permit or contract, before marked or otherwise designated	25.00
261.6(e)	Loading, removing, or hauling any timber or other forest product not properly identified	25.00
261.8(b)	Simple possession of firearm	25.00
261.8(c)	Simple possession of equipment which could be used for hunting, fishing, or trapping	25.00
261.8(d)	Possess dog not on leash or otherwise confined	25.00
261.9(a)	Mutilating, defacing, removing, disturbing, injuring, or destroying any natural feature or any property of U. S.	25.00
(Minor)		
261.9(b)	Removing, destroying or damaging any plant that is classified threatened, endangered, rare or unique species	25.00
(Minor)		
261.10(c)	Selling or offering for sale any unauthorized merchandise	25.00
261.10(e)	Abandoning a vehicle, animal or personal property	25.00
261.10(f)	Placing vehicle or other object on land in a manner causing impediment or hazard	25.00
261.10(g)	Distributing advertising materials without consent	25.00

Section Number	Offense	Collateral
261.10(h)	Unauthorized use of audio or noise-producing devices	\$ 25.00
261.10(i)	Unauthorized use of public address system	25.00
261.10(j)	Conducting, demonstrating, or participating in public meeting, assembly, etc., without permit	25.00
261.11(b)	Possess or leave refuse, debris, or litter in exposed or unsanitary condition	25.00
261.11(c) (Minor)	Placing harmful pollutants or objectionable wastes in or near stream, lake or other water	25.00
261.11(d)	Failing to dispose of all garbage or rubbish properly	25.00
261.11(e)	Dumping or leaving in refuse container, dump, etc., refuse, debris, or litter from private property	25.00
261.12	The following are prohibited on Forest development roads and trails: (a) Violation of load, weight, height, length or width limitation prescribed by state law except by permit (b) Fail to have vehicle weighed at weighing station (c) Fail to stop vehicle when directed by forest officer (d) Damaging and leaving in damaged condition any road, trail, or segment thereof (Minor offense) (e) Blocking, restricting, or otherwise interfering with use of a road, trail or gate (f) Using motorized vehicles in excess of 40 inches in width on a trail	 25.00 25.00 25.00 25.00 25.00 25.00
261.13	Use of vehicles off roads prohibited as follows: (a) Without valid license as required by State (b) Without operable braking system (c) Not equipped with working head and tail lights as required by State (d) In violation of applicable noise emission standard established by Federal or State (f) Creating excessive or unusual smoke	 25.00 25.00 25.00 25.00 25.00
261.14	The following are prohibited at Developed Recreation Sites: (a) Occupying any portion of site for other than recreation purposes (b) Building, attending, maintaining or using fire outside fire ring, stove, grill or fireplace (c) Unauthorized cleaning or washing any personal property, fish, animal, or food at a hydrant or water faucet not provided for that purpose (d) Discharging or igniting a firecracker, rocket, or other firework or explosive (Minor offense) (e) Occupying between 10 p.m. and 6 a.m. a place designated for day use only (f) Failing to remove all camping equipment or personal property when vacating area or site (g) Unauthorized placing, maintaining, or using camping equipment (h) Fail to occupy camping area during first night after camping equipment set up without permission (i) Leave camping equipment unattended for more than 24 hours without permission (j) Bring in or possess animal, other than seeing eye dog, unless crated, caged, leashed, or otherwise under physical restrictive control (k) Bring in or possess animal in swimming area (l) Bring in or possess a saddle, pack, or draft animal, except as authorized (m) Operate or park motor vehicle or trailer except in designated spaces (n) Unauthorized operation of bicycle, motorbike, or motorcycle on a trail (o) Driving bicycles, motorbikes, and motorcycles on roads in recreation sites for other than ingress or egress	 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00 25.00

Section
Number

Offense

Collateral

	(p) Distributing handbill, circular, paper or notice without permit	\$ 25.00
	(q) Deposit any body waste except into receptacles provided for that purpose	25.00
261.15	Failure to pay established entrance or recreation use fees as directed	10.00
261.16	The following are prohibited in a National Forest Wilderness:	
	(a) Possessing or using a motor or motorized equipment except small battery-powered, hand-held devices	25.00
	(b) Possessing or using a hang glider or bicycle	25.00
	(c) Landing aircraft; dropping or picking up any material, supplies, or person from aircraft except by permit or authorization	25.00
WHEN PROVIDED BY AN ORDER THE FOLLOWING ARE PROHIBITED:		
261.53	Going into or being upon any area which is closed for protection of:	
	(a) Threatened, endangered, rare, unique or vanishing species of plants, animals, birds or fish	25.00
	(b) Special biological communities	25.00
	(c) Objects or areas of historical, archeological, geological or paleontological interest	25.00
	(d) Scientific experiments or investigations	25.00
	(e) Public health or safety	25.00
	(f) Property	
261.54	Forest development roads:	
	(a) Using any type of vehicle prohibited by Order	25.00
	(b) Use by any type traffic prohibited by Order	25.00
	(c) Using a road for commercial hauling without a permit or written authorization	25.00
	(d) Operating vehicle in violation of speed, load, weight, height, length, width or other limitation specified by Order	25.00
	(e) Being on the road	25.00
261.55	Forest development trails:	
	(a) Being on the trail	25.00
	(b) Using a bicycle or motorized vehicle	25.00
	(c) Possessing or using a saddle, pack or draft animal	25.00
	(d) Shortcutting a switchback	25.00
261.56	When provided by an order, it is prohibited to possess or use a vehicle off forest development roads	25.00
261.57	National Forest Wilderness:	
	(a) Entering or being in the area	25.00
	(b) Possessing camping or pack-outfitting equipment, as specified in the order	25.00
	(c) Simple possession of a firearm or firework	25.00
	(d) Possessing any non-burnable food or beverage containers, including deposit bottles, except for non-burnable containers designed and intended for repeated use	25.00
	(f) Storing equipment, personal property or supplies	25.00
	(g) Disposing of debris, garbage, or other waste	25.00
(Minor)	Occupancy and use:	
261.58	(a) Camping for a period longer than allowed by order	25.00
	(b) Entering or using a developed recreation site or portion thereof	25.00
	(c) Entering or remaining in a campground during night periods prescribed in order except for persons who are occupying such campgrounds	25.00
	(d) Occupying a developed recreation site with prohibited camping equipment	25.00
	(e) Camping	25.00
	(f) Using a campsite or other area by more than number of users allowed by order	25.00
	(g) Parking or leaving a vehicle in violation of a posted sign	25.00
	(h) Parking or leaving a vehicle outside a parking space assigned to one's own camp unit	25.00
	(i) Possessing, parking, or leaving more than two vehicles, except motorcycles or bicycles, per camp unit	25.00

Section Number	Offense	Collateral
(Minor)	(k) Entering or being in a body of water	\$ 25.00
	(l) Being in the area after sundown or before sunrise	25.00
	(m) Discharging a firearm, air rifle, or gas gun	25.00
	(n) Possessing or operating a motorboat	25.00
	(o) Water skiing	25.00
	(p) Storing or leaving a boat or raft	25.00
	(q) Operate watercraft in excess of posted speed limit	25.00
	(r) Launching boat except at designated launching ramp	25.00
	(s) Possessing or transporting a bird or animal	25.00
	(t) Possessing or transporting any part of a tree or a plant	25.00
	(u) Being in the area between 10 P.M. and 6 A.M. except a person who is camping or who is visiting person camping in that area	25.00

TRAFFIC OFFENSES TO WHICH NORTH CAROLINA LAW IS APPLICABLE

Section Number	Offense	Collateral
A.	Speeding violations:	
	1. 0-5 m.p.h. over applicable limit	15.00
	2. 6-10 m.p.h. over applicable limit	20.00
	3. 11-15 m.p.h. over applicable limit	25.00
	4. 16-20 m.p.h. over applicable limit	35.00
B.	Other violations:	
	Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
	Driving wrong way on dual-lane highway	40.00
	Litterbugging	30.00
	Improper passing	25.00
	Failure to dim lights	25.00
	Illegal transportation of one (1) quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle [N.C.G.S. 18-51(1)]	25.00
	Driving too slowly	20.00
	Exceeding a safe speed	15.00
	Following too closely	15.00
	Failure to stop for red light or stop sign	15.00
	Failure to yield right-of-way	15.00
	Improper turn and/or improper signal	15.00
	Driving wrong way on one-way city street	15.00
	Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
	Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

Section Number	Offense	
261.3	Interfering with forest officer	
261.4	Disorderly conduct:	
	(a) Engaging in fighting, or in threatening or abusive behavior	
	(b) Inciting or participating in a riot	
	(c) Making unreasonable noise	
261.5	Fire:	
	(a) Carelessly or negligently throwing or placing any burning, glowing, or ignited substance, or any other substance or thing which may cause a fire, into any place where it might start a fire	
	(b) Firing any tracer bullet or incendiary ammunition	
	(c) Causing timber, trees, slash, brush, or grass to burn except as authorized by permit	
	(e) Allowing a fire to escape from control	
	(f) Building, attending, maintaining, or using campfire without removing all adjacent flammable material.	

Section
Number

Offense

261.6

Timber and other forest products:

(Major)

(a) Unauthorized cutting, damaging, marking, or removing timber or other forest products

(Major)

(b) Cutting any standing tree, under permit or contract, before marked or otherwise designated

(c) Removing any timber or other forest product to undesignated place for scaling; or removing from designated place before scaled, measured, counted, or otherwise accounted for by forest officer

(d) Stamping, marking with paint, or otherwise identifying for cutting any tree or other forest product in a manner similar to that employed by forest officers

(Major)

(e) Loading, removing or hauling any unidentified timber or other forest product acquired under permit or timber sale contract

(f) Selling or exchanging timber or other forest product obtained under free use

(g) Violation of any timber export or substitution restriction

261.7

Livestock:

(a) Placing or allowing unauthorized livestock to enter or be in National Forest System

(b) Failing to remove unauthorized livestock when requested to do so by forest officer

(c) Failing to reclose any gate or other entry

(d) Molesting, injuring, removing or releasing any impounded livestock in the custody of the Forest Service or its authorized agents

261.8

Fish and wildlife:

(a) Hunting, trapping, fishing, catching, molesting, killing or having in possession any kind of wild animal, bird, or fish, or taking the eggs of any such bird

(Major)

(b) Possessing a firearm or other implement designed to discharge a missile capable of destroying animal life

(Major)

(c) Possessing equipment which could be used for hunting, fishing or trapping

261.9

Property:

(Major)

(a) Mutilating, defacing, removing, disturbing, injuring, or destroying any natural feature or any property of U.S.

(Major)

(b) Removing, destroying, or damaging any plant that is classified threatened, endangered, rare or unique species

(c) Entering any building or structure which is not open to the public

(d) Unauthorized use of any herbicide, pesticide or fungicide

(e) Digging in, excavating, disturbing, injuring, or destroying any archeological, paleontological, or historic site, or removing, disturbing, injuring or destroying an object in such site

261.10

Occupancy and use:

(a) Constructing, placing, or maintaining any kind of improvement without a permit

(b) Squatting or making settlement on Forest Service land

(d) Discharging a firearm or any other implement capable of taking human life, causing injury, or damaging property

261.11

Sanitation:

(a) Depositing in any toilet, toilet vault, or plumbing fixture any substance which could damage or interfere with operation or maintenance of fixture

(Major)

(c) Placing harmful pollutants or objectionable wastes in or near stream, lake or other water

261.12

Forest development roads and trails:

(Major)

(d) Damaging and leaving in damaged condition any road, trail, or segment thereof

261.13

Use of vehicles off roads:

(e) Operate motor vehicle while under the influence of alcohol or other drug

(g) Operate motor vehicle carelessly, recklessly, or without regard for the safety of any person, or in a manner that endangers, or is likely to endanger, any person or property

Section Number	Offense
261.14	Developed recreation sites:
(Major)	(d) Discharging or igniting a firecracker, rocket, or other firework or explosive

WHEN PROVIDED BY AN ORDER THE FOLLOWING ARE PROHIBITED:

261.52	Fire:
	(a) Building, maintaining, attending, or using a fire, campfire, or stove fire
	(b) Using an explosive
	(c) Smoking
	(d) Smoking, except inside a building or vehicle, or while seated in an area at least 3 feet in diameter that is barren or cleared of all flammable materials
	(e) Going into or being upon an area
	(f) Possessing, discharging or using any kind of firework or other pyrotechnic device
	(g) Entering an area without any firefighting tool prescribed by order
	(h) Operating an internal combustion engine except on a road
	(i) Welding or operating acetylene or other torch with open flame
	(j) Operation of any internal or external combustion engine on any timber, brush, or grass covered land, not properly equipped with spark arrester
	(k) Violating any state law concerning burning, fires, or which is for the purpose of preventing or restricting the spread of fires
261.57	National Forest Wilderness:
(Major)	(c) Possessing a firearm or firework
	(e) Grazing
(Major)	(g) Disposing of debris, garbage, or other waste
261.58	Occupancy and use:
	(j) Being publicly nude
(Major)	(m) Discharging a firearm, air rifle, or gas gun

STATE LAWS APPLICABLE:

- All pleas of not guilty
- All felonies
- Any violation resulting in personal injury
- Driving under the influence [N.C.G.S. 20-138; 20-139]
- Exceeding the applicable speed limit by over 21 m.p.h.
- Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing) [N.C.G.S. 20-141.3]
- Passing stopped school, school activity; or church bus
- Failure to yield right-of-way to emergency vehicles
- Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire
- Any violation charged in the same warrant or summons with a mandatory appearance violation
- Illegal transportation of liquor (more than one quart)
- Leaving the scene of an accident in which involved, or failing to report such an accident [N.C.G.S. 20-166; 20-166.1]
- Driving while license suspended or revoked, or permitting an owned vehicle to be so operated [N.C.G.S. 20-28; 20-34]
- Driving with false, forged, or altered driver's license, or permitting an owned vehicle to be so operated [N.C.G.S. 20-28; 20-34]
- Any violation of the Financial Responsibility Laws [Chapter 20, Articles 9A and 13]
- Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates
- Any violation involving a false affidavit, or false statement under oath, or perjury [N.C.G.S. 20-17(5); 20-31; 20-313.1]
- Careless and reckless driving [N.C.G.S. 20-140; 20-140.1]

NATIONAL FISH AND WILDLIFE VIOLATIONS

Title 50, Chapter I, Code of Federal Regulations and Title 16 United States Code

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
THE MIGRATORY BIRD TREATY ACT:		
16 USC 703	Take or possess migratory non-game birds	\$ 50.00
	Each bird so possessed	10.00
MIGRATORY GAME BIRDS:		
20.21(a)	Take migratory game birds with illegal device or substance	100.00
20.21(b)	Take migratory game birds with unplugged shotgun capable of holding more than three shells	50.00
20.21(c-h)	Take migratory game birds from or with use of unlawful means such as, but not limited to, sinkboxes, motor vehicles, motor boats, live birds as decoys, electrically amplified bird calls	100.00
20.21(i)	Take migratory game birds by the aid of bait, or on, or over baited area	200.00
	Miscellaneous regulations adopted for special areas or conditions . .	50.00
20.23	Take migratory game birds less than one hour before or after hours open to shooting	100.00
20.24]	Exceeding daily bag or possession limit	100.00
20.33]		
20.34]		
20.35]		
20.25	Each bird in excess of limit	25.00
	Failure to retrieve killed or crippled birds	100.00
	For each bird not retrieved	25.00
20.31	Possessing migratory game birds taken in violation of sections 20.21 — 20.25	100.00
20.22 and 20.32	Take or possess freshly killed migratory game birds during closed season	150.00
	Each bird so possessed	25.00
20.36	Failure to tag migratory game birds as required by regulation . . .	50.00
20.37 and 20.81	Receiving or having custody of untagged migratory game birds belonging to another — each bird	25.00
20.38	Possessing or transporting live migratory game birds taken pursuant to these regulations	100.00
	Each bird so possessed or transported	25.00
MIGRATORY BIRD HUNTING STAMP ACT:		
16 USC 718 (a)(e) 71.2(b)	Take migratory waterfowl without valid Federal migratory-bird hunting stamp (commonly called Duck Stamp), and related violations	25.00
MIGRATORY BIRD CONSERVATION ACT — NATIONAL WILDLIFE REFUGE: 16 USC 715		
National Wildlife System — Title 50, Subchapter C, Part 26, Code of Federal Regulations		
25.42	Failure to exhibit permits upon request by authorized officer	25.00
26.21(a)	Trespassing on any wildlife refuge area	25.00
26.21(b)	Unlawfully permitting domestic animals to enter upon or roam at large in wildlife refuge area	25.00
26.22	Unauthorized entering, occupying, using, or being upon wildlife refuge area	25.00
26.36	Conducting public meetings, assemblies, demonstrations, parades, etc., without permit	25.00
27.31(c-m)	Operation of motor vehicles in wildlife refuge area; violation of regulations	50.00
27.32	Unauthorized use of boats in wildlife refuge area	15.00
27.33	Water skiing in violation of regulations	25.00
27.34	Unauthorized operation of aircraft at low altitudes or unauthorized landing of aircraft except in emergencies	25.00
27.41	Unauthorized carrying, possessing, or discharging firearms, fireworks, explosives	15.00

Section Number	Offense	Collateral
27.42	Unauthorized possession, transportation, or use of firearms	\$ 100.00
27.43	Unauthorized use and possession of crossbows, bow and arrow, air guns, or other weapons on wildlife refuge area	25.00
27.51 (Minor)	Molesting, disturbing, damaging, or destroying plant or animal life on wildlife refuge area	15.00
27.61	Destruction, defacement, or removal of public property from wildlife refuge area	50.00
27.65	Tampering with motor vehicle, boat, equipment or machinery	100.00
27.71	Unauthorized making of motion or sound pictures	100.00
27.72	Operation of electrical sound equipment in a manner disturbing to animal life or persons in wild life refuge area	25.00
27.73	Unauthorized use of artificial light for the purpose of supporting, locating, or taking any animal in wildlife refuge area	25.00
27.81	Entering or remaining in national wildlife refuge area while under the influence of alcohol	25.00
27.83	Indecency and disorderly conduct	25.00
27.86	Begging or solicitation of funds in support of any cause or organization on wildlife refuge area	25.00
27.91	Unauthorized conducting of field trials on wildlife refuge area . . .	25.00
27.93	Abandonment of personal property in wildlife refuge area	25.00
27.94 (Minor)	Littering and disposing of waste materials	25.00
27.95(b-d)	Building camp fires, leaving fires unattended, discarding burning cigarettes, and similar prohibited acts	25.00
27.96	Distributing advertising materials	75.00
27.97	Soliciting business or conducting commercial enterprise without authority	25.00
31.16	Unauthorized trapping of, attempting to trap animals on wildlife refuge area	200.00
32.2(a-d)	Violation of general hunting regulations applicable to lawful hunting or fishing on wildlife refuge area	25.00
33.2(a-c)	Failure to comply with terms and conditions of access or use of wildlife refuge area	25.00
33.2(d)	Violation of special terms and conditions and special regulations governing hunting on wildlife refuge area	50.00

MANAGEMENT OF FISHERIES CONSERVATION AREAS — NATIONAL FISH HATCHERIES		
16 USC 742a et seq.		
70.4(b)	Unlawfully taking fish or other aquatic animals on National Fish Hatchery areas	100.00
70.4(c)	Unlawfully hunting, taking, or attempting to hunt or take any animal on National Fish Hatchery area	100.00
71.2(a) (d)	Violation of applicable State laws governing area of National Fish Hatchery	25.00
71.12(a) (c)	Failure to comply with applicable provisions of Federal law and other regulations on National Fish Hatchery area	25.00
71.12(b)	Failure to comply with terms and conditions of access to National Fish Hatchery area	25.00
71.12(e)	Failure to comply with special notices governing hunting and fishing on National Fish Hatchery area	25.00

MANDATORY APPEARANCE VIOLATIONS

NOTE: Whoever, in violation of the Migratory Bird Treaty Act, shall:
“(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or
(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.” [16 U.S.C. 707(b)]
Since this violation is a felony, forfeiture of collateral is not permissible.

20.23 Taking migratory game birds more than one hour before or after hours open to shooting

*Section
Number*

Offense

27.31(b)	Operating motor vehicle or boat under the influence of intoxicants or drugs
27.32(b)(3)	
27.31(c)	Operate motor vehicle carelessly or heedlessly
27.51 (Major)	Molesting, disturbing, damaging, or destroying plant or animal life on wildlife refuge area
27.52	Introduction of plant or animal life taken elsewhere, into wildlife refuge area
27.62	Searching for or removing objects of antiquity from wildlife refuge area without authority
27.63	Searching for buried treasure, valuable rocks, stones, or mineral specimens without special permit
27.64	Prospecting for mineral deposits, filing mining claims, or removal of materials without authorization
27.82(b) (1, 2)	Delivery or possession of controlled substance, except as authorized by law
27.82(b) (3)	Being present in a national wildlife refuge area while under the influence of a controlled substance
27.84	Disturbing, molesting, or interfering with employee of U.S. or State Government engaged in official business
27.85	Gambling or operation of gambling devices in wildlife refuge area
27.92	Constructing buildings, other structures, or obstructions on wildlife refuge area
27.94 (Major)	Littering and disposing of waste materials
27.95(a)	Setting on fire timber, brush, grass without authorization
32.2(g)	Use of any drug on an arrow for bow hunting, or possession of arrows employing such drugs, on any national wildlife refuge
	Any violation charged in the same warrant or summons with a mandatory appearance violation
	All pleas of not guilty
	All felonies

BLACK BASS ACT — 16 USC 851 et seq.:

Any violation including, but not limited to, interstate transportation of black bass or other fish taken in violation of law; receiving, making false records

CHEROKEE INDIAN RESERVATION

THE EASTERN BAND OF CHEROKEE INDIANS

QUALLA BOUNDARY

Title 18, United States Code

Section Number 1165 — Hunting, Trapping, Fishing on Indian Land

FISHING:

<i>Number</i>	<i>Offense</i>	<i>Collateral</i>
1.	Exceeding creel limit	\$ 25.00
2.	Each fish in excess of creel limit	10.00
3.	Fishing without permit	25.00
4.	Snagging of fish	25.00
5.	Grabbing of fish	25.00
6.	Chumming of fish	25.00
7.	Fishing with more than one line	25.00
8.	Setting of trotline	25.00
9.	(a) Fishing in closed ponds posted "No Fishing" or "No Trespassing"	50.00
	(b) Each fish taken unlawfully from closed ponds	10.00
10.	Indian aiding and abetting principal in above offenses shall post similar collateral	
11.	Fishing on a closed stream	25.00

Section Number	Offense	Collateral
12.	Fishing before or after legal fishing hours	\$ 25.00
13.	Winter Fishing Program (Nov. 1 — Last day of Feb.)	
	(a) Use of bait other than artificial	25.00
	(b) Keeping fish under minimum (12") size	25.00

HUNTING:

1.	Non-Indian hunting on the reservation	200.00
2.	Indiana aiding and abetting a non-Indian hunting on the reservation.	200.00
3.	Small game violations:	
	(a) Excess bag limit	25.00
	(b) Each animal over bag limit	10.00
4.	Big game violations (bear and deer)	100.00

TRAPPING:

1.	Non-Indian trapping on the reservation	200.00
2.	Indian aiding and abetting a non-Indian trapping on the reservation.	200.00

MANDATORY APPEARANCE VIOLATIONS

[For Section Number 1165]

1. Seining of fish
2. Selling of fish — Buying or selling of game fish
3. Gigging or spearing fish
4. Dynamiting or poisoning of fish
5. Destruction of fish in Tribal holding facilities

MANDATORY APPEARANCE VIOLATIONS

[For Section Number 1164]

1. Destroying boundary or warning signs

Traffic offenses upon North Carolina Highways traversing the Cherokee Indian Reservation (Bureau of Indian Affairs Roads excluded) to which North Carolina Motor Vehicle Laws are applicable:

A.	SPEEDING VIOLATIONS:	Collateral
	1. 0-5 m.p.h. over applicable limit	\$ 15.00
	2. 6-10 m.p.h. over applicable limit	20.00
	3. 11-15 m.p.h. over applicable limit	25.00
	4. 16-20 m.p.h. over applicable limit	35.00
B.	OTHER VIOLATIONS:	
	Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
	Driving the wrong way on a dual lane highway	40.00
	Litterbugging	30.00
	Improper passing	25.00
	Failure to dim lights	25.00
	Height and width violations	25.00
	Illegal transportation of one (1) quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle [N.C.G.S. 18-51(1)]	25.00
	Driving too slowly	20.00
	Any parking violation	15.00
	Exceeding a safe speed	15.00
	Following too closely	15.00
	Failure to stop for red light or stop sign	15.00
	Failure to yield right-of-way	15.00
	Improper turn and/or improper signal	15.00

B. OTHER VIOLATIONS:

Driving wrong way on a one-way city street	<i>Collateral</i> \$ 15.00
Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

All pleas of not guilty	
All felonies	
Any violation resulting in personal injury	
Driving under the influence of intoxicants or drugs [G.S. 20-140; 20-140.1]	
Exceeding applicable speed limit by over 21 m.p.h.	
Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing) [G.S. 20-141.3]	
Passing stopped school bus, school activity, or church bus	
Failure to yield right-of-way to emergency vehicles	
Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire	
Illegal transportation of liquor (more than one quart)	
Leaving scene of an accident in which involved, or failing to report such an accident [G.S. 20-166; 20-166.1]	
Driving while license suspended or revoked, or permitting an owned vehicle to be so operated [G.S. 20-28; 20-34]	
Driving with false, forged, or altered driver's license, or permitting an owned vehicle to be so operated	
Any violation of the financial responsibility laws (Chapter 20, Articles 9A and 13)	
Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates	
Any violation involving a false affidavit, or false statement under oath, or perjury [G.S. 20-17(5); 20-31; 20-313.1]	
Any violation charged in the same warrant or summons with a mandatory appearance violation	

GENERAL SERVICES ADMINISTRATION VIOLATIONS

Title 41, Chapter 101, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
20.301	Recording presence on Federal property outside normal working hours and/or displaying identification upon request of authorized personnel	\$ 25.00
20.302	Littering, disposing of rubbish on Federal property	15.00
20.303	Failure to comply with official signs and with directions of authorized officials	15.00
20.304	Disorderly conduct; obstructing use of facilities; impede or disrupt performance of official duties by Government employees	25.00
20.305	Gambling; conducting lottery or pool; selling or buying lottery tickets	25.00
20.307	Soliciting; collecting private debts; unauthorized commercial advertising; and vending	25.00
20.308	Unauthorized distribution of handbills, pamphlets, etc.; displaying of placards or posting of material on bulletin boards or elsewhere . .	15.00
20.309	Unauthorized taking of photographs for news, advertising or commercial purposes	15.00
20.310	Bringing animals (except seeing-eye dogs) on premises for unofficial purposes	15.00
20.311	Vehicular and pedestrian traffic — failure to comply with signals and directions; blocking entrances, driveways, etc.; unauthorized parking	15.00

MANDATORY APPEARANCE VIOLATIONS

Section Number	Offense
20.302	Willful destruction, damage, or removal of Federal property or creating hazard to persons thereon
20.306	Operating a motor vehicle while under influence of alcohol or drugs; entering upon Federal property while under the influence of alcohol or drugs; use of drugs or alcoholic beverage
20.312	Carrying firearms, dangerous or deadly weapons or explosives, openly or concealed, except for official purposes
20.313	Discrimination by segregation or otherwise on the basis of race, creed, color, sex, or national origin in furnishing or refusing facilities of a public nature
	Any violation charged in the same warrant or summons with a mandatory violation
	All pleas of not guilty
	All felonies

VETERANS ADMINISTRATION FACILITIES VIOLATIONS

Title 38, Part I, Sections 1.218 and 1.219 Code of Federal Regulations

(Veterans Administration referred to as VA)

Section Number	Offense	Collateral
1.218(b)	Entry upon, or failure to leave, closed premises by unauthorized persons	5.00
1.218(c)	Littering, willful damage or destruction or unauthorized removal of Government property from VA premises or national cemeteries causing loss to Government not exceeding \$50	10.00
1.218(d)	Refusal to comply with prohibitory signs or directions of officials during emergencies	15.00
1.218(e)	Conduct on property which: creates loud or unusual noise; unreasonably obstructs usual use of entrances, foyers, etc.; impedes or disrupts official performance of Government employees; prevents one from obtaining medical or other services; or use of loud, abusive, or otherwise improper language; or unwarranted loitering, sleeping, or assembly	15.00
1.218(e)	Failure to leave premises when so ordered as a result of creating disturbances	15.00
1.218(f)	Gambling, conducting lottery, selling or purchasing numbers tickets	25.00
1.218(h)	Unauthorized soliciting, vending, commercial advertising, and collecting private debts	5.00
1.218(i)	Unauthorized distribution of advertising material	5.00
1.218(j)	Unauthorized photography; photography for commercial purposes	5.00
1.218(k)	Bringing animals (except seeing-eye dogs) onto VA property without authorization	5.00
1.218(l)	Parking in or blocking emergency vehicle spaces or entrances; blocking access to fire hydrants or spaces reserved for physically disabled persons	15.00
1.218(l)	Failure to comply with traffic signals and directions or posted signs; blocking entrances, driveways, walks, or loading platforms, creating excessive noise	10.00
1.218(l)	Unauthorized parking in reserved locations, parking in excess of posted time limits	5.00
1.218(n)	Conducting unauthorized service, ceremony, or demonstration	15.00

MANDATORY APPEARANCE VIOLATIONS

1.218(c)	Willful destruction, damage, or unauthorized removal of Government property from VA premises or national cemeteries causing loss to Government of \$50.00 or more
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Section Number	Offense
1.218(g) (1)	Careless and reckless driving; operating motor vehicle under the influence of alcohol or drugs; unauthorized use or possession of alcohol or drugs (not prescribed for use as medicine)
1.218(m)	Carrying firearms, dangerous or deadly weapons or explosives, except for official purposes
1.218(o)	Unauthorized opening or attempting to open locks or card-operated barrier mechanisms; unauthorized possession, manufacture, or use of keys or barrier cards which operate locks to rooms or areas
1.218(p)	Prostitution, solicitation, and sexual misconduct Any violation charged in the same warrant or summons with a mandatory violation All felonies All pleas of not guilty

The amendment by order dated June 1, 1977, rewrote this rule.

The amendment by order dated March 6, 1979, made changes in the schedule of National Park

Service violations, National Fish and Wildlife violations, and Cherokee Indian Reservation violations.

Sessions of Grand Jury.

(1) Grand juries shall be convened in Charlotte on the first Monday in February, April, June, August, October, and December; in Asheville on the first Monday in January, March, May, July, September, and November. For the convenience of jurors, witnesses and court personnel, the grand jury convened in Charlotte shall generally pass upon indictments for the Charlotte and Statesville Divisions and shall be composed of members drawn from both Divisions; the grand jury convened in Asheville shall generally pass upon indictments for the Asheville, Bryson City, and Shelby Divisions and shall be composed of members drawn from those Divisions.

(2) All grand juries shall consist of nineteen (19) members, who shall serve for a 12-month period, and shall have authority to pass upon indictments for all crimes committed within this district regardless of the Division in which such juries may sit.

Editor's Note. — This rule was adopted by order dated October 31, 1975.

Regular Terms for Trial of Criminal Cases.

Beginning November 1, 1975, the regular terms of this Court for the disposition of criminal cases shall be as follows:

ASHEVILLE DIVISION:

First Monday, January, March, May, July, September, November

BRYSON CITY DIVISION:

Third Monday, January, March, May, July, September, November

SHELBY DIVISION:

(Rutherfordton)

Fourth Monday, January, March, May, July, September, November

STATESVILLE DIVISION:

Third Monday, February, April, June, August, October, December

CHARLOTTE DIVISION:

First Monday, February, April, June, August, October, December.

(When the first day of any scheduled term falls on a legal holiday, court will convene the following day.)

Editor's Note. — This rule was adopted by order dated October 31, 1975.

Additional Duties of Magistrates.

In accordance with Rule 83, Federal Rules of Civil Procedure, and Rule 57, Federal Rules of Criminal Procedure, and specifically, pursuant to the provisions of 28 U. S. C. § 636(b), the following additional duties are hereby specified for the United States Magistrates for the Western District of North Carolina, when directed by the Court: Conduct post-indictment arraignments, and ordering a pre-sentence report on a defendant who signifies the desire to plead guilty.

In accordance with Rule 57, Federal Rules of Criminal Procedure, and specifically, pursuant to the provisions of U.S.C., § 636(b), the following additional duty is hereby specified for the United States Magistrates, United States District Court, Western District of North Carolina: Receive true bills of indictment returned by the grand jury in open court and receive reports of no true bills from the foreman of the grand jury in writing, pursuant to Rule 6(f), Federal Rules of Criminal Procedure, as amended August 1, 1976.

Editor's Note. — The first paragraph of this rule was adopted by order dated October 31, 1975, and the second paragraph was adopted by order dated September 23, 1976.

Rule for Custody and Disposition of Models, Exhibits, and Depositions.

Custody

All models, diagrams, exhibits, depositions and other material admitted in evidence or filed in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Removal

All models, diagrams, exhibits, depositions, or other material placed in the custody of the clerk shall be removed by the party offering such evidence, or filing such materials, within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court. At the time of removal, a detailed record of the disposition shall be filed in the case jacket.

If the party offering, or filing, models, diagrams, exhibits, depositions or other material fails to remove such materials as provided herein, the clerk shall write the attorney of record, of [or] if none, the party offering the evidence, calling attention to the provisions of this rule. If after the mailing of such notice the materials have not been removed within 30 days, they may be destroyed by the clerk.

Editor's Note. — This rule was adopted by order dated July 22, 1977, effective August 1, 1977.

II. Bankruptcy Rules

Rule 23. Automatic Reference of Chapter X Bankruptcy Cases.

Effective August 1, 1975, all Chapter X cases then pending are hereby referred and thereafter the Clerk shall, on the filing of a Chapter X petition, refer the case forthwith to the referee as bankruptcy judge. Thereafter, all proceedings in the Chapter X cases shall be before the referee except that:

(1) A district judge may, at any time, for the convenience of parties or other cause, withdraw a case in whole or in part from a referee and either act himself or assign the case or part thereof to another referee in the district; or where

(2) It appears to a referee in a contempt proceeding under Rule 920 that conduct prohibited by Section 41a of the Bankruptcy Act may warrant punishment by imprisonment or by a fine of more than \$250.00, he may certify the facts to the district judge who shall then proceed as for a contempt not committed in his presence; or where

(3) A complaint seeks an injunction to restrain a court (which may be issued by the judge only); or where

(4) The office of referee is vacant or its occupant is temporarily absent or disqualified to act or whenever the expeditious transaction of the business of the court or courts of bankruptcy may require, the judge, or any one of the judges may act; or any of the other contingencies set forth in Section 43c of the Bankruptcy Act apply; or where

(5) An appeal is taken to the district court pursuant to Part VIII of the Federal Rules of Bankruptcy Procedure.

Editor's Note. — This rule was adopted by order filed June 18, 1975, effective Aug. 1, 1975.

Appendix V. Extradition

(The following publication, "State of North Carolina Extradition Manual, Requirements and Forms," was issued by the Governor's Office in 1973.)

§ 8194. Transportation of fugitive to receiving agent

Any agent appointed or designated in section 8192 of this title who receives the fugitive into his custody is obligated to transport him to the State or Territory from which he has fled.

§ 8195. Payment of fees and costs

All costs or expenses incurred in any extradition proceeding in apprehending, securing and transporting a fugitive shall be paid by the demanding authority.

The above sections of the Constitution, and the above federal law form the basis of the interstate extradition of fugitives criminal in all the states. The Constitution establishes the right to demand the fugitive, and the federal law regulates the machinery.

STATE OF NORTH CAROLINA

EXTRADITION MANUAL

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INTRODUCTION

EXTRADITION is the surrender by one state or nation to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which being competent to try and punish him, demands the surrender. Rendition is the return of such individual to the demanding state or nation.

In September 1787, Article IV of the Constitution of the United States was adopted.

Article IV, Sec. 2 reads:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Chiefly because the constitutional provision requiring extradition was not self-executing in that it provided no machinery for its execution, Congress, in 1793, passed the Federal Act (18 U.S.C.A. Sec. 3182, 3194, 3195), which provides as follows:

§ 3182. Fugitives from State or Territory to State, District or Territory

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

§ 3194. Transportation of fugitive by receiving agent

Any agent appointed as provided in section 3182 of this title who receives the fugitive into his custody is empowered to transport him to the State or Territory from which he has fled.

§ 3195. Payment of fees and costs

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

The above section of the Constitution and the above federal law form the basis of the interstate extradition of fugitive criminals in all the states. The Constitution establishes the right to demand the fugitive, and the federal law creates the machinery.

The states can, by statute, promulgate any additional procedural requirements they desire — as long as such requirements are not contrary to the Federal Act.

In an effort to erase the confusion and uncertainty as to what was required in order to extradite a person from another state, because of each state's own peculiar set of rules, the Commissioners on Uniform State Laws prepared an Act, known as the Uniform Criminal Extradition Act, embracing the best features of the various laws of the several states as well as the judicial law applicable, and offered it as a practicable law for all of the states to adopt, thus codifying the practice and promoting uniformity at the same time. This uniform law has now been adopted and passed by 45 states, including the District of Columbia, the Panama Canal Zone, the Virgin Islands, Guam and Puerto Rico. The law was passed in North Carolina in 1937, ratified on March 20, 1937, and is now North Carolina General Statutes 15-55 through 15-84. In all 45 states which have adopted the Uniform Law, the extradition proceedings are normally identical in each.

Therefore, in each of the remaining jurisdictions that have not adopted the Uniform Act, the extradition procedure varies somewhat. However, a safe rule to follow is: Anything which will satisfy the requirements of the Uniform Act will probably also be sufficient in the states which have not adopted the Act.

BASIC STEPS IN EXTRADITING A FUGITIVE

- I. Location and arrest of the fugitive in the asylum state.
- II. Request to Governor of demanding state for issuance of requisition and commission of agent.
- III. Issuance by Governor of demanding state of requisition and commission of agent.
- IV. Presentation of these papers to the Governor of the asylum state and approval of the papers by him or his legal counsel.
- V. Possibly, a hearing before the Governor of [or] his authorized agent in the asylum state.
- VI. Issuance of Governor's warrant by Governor of the asylum state, and arrest of the fugitive under this warrant.
- VII. Possibly, habeas corpus proceedings in the asylum state to test the sufficiency of the Governor's warrant.
- VIII. Possibly, file for review with the appellate court if the writ of habeas corpus is denied.

THE ROLE OF THE LOCAL LAW ENFORCEMENT OFFICER AND THE SOLICITOR BEFORE THE ACTUAL PRE- PARATION OF THE APPLICATION FOR REQUISITION BY THE SOLICITOR

- I. The Law Enforcement Officer Must First Know What Crimes Are Extraditable.
 - A. Misdemeanors and felonies are extraditable.
 - B. Each misdemeanor case, of course, should be considered on its own merits.
 - C. The following are policy statements which most states will follow in considering whether to grant extradition from their state. It is recommended that all prosecutors consider the following resolutions before initiating their request for extradition.

Nonsupport:

1. The Uniform Reciprocal Enforcement of Support Act should be employed prior to seeking extradition. If it has not been employed, and [an] affidavit from the prosecutor or appropriate law enforcement officer should be filed with the papers, explaining in detail the reason why the uniform act has not been employed. This is intended to apply also to similar charges such as abandonment of minor children, etc. The term "nonsupport" is used in its generic sense.

Worthless Checks:

1. Extradition on the charge of writing checks with insufficient funds should not be instituted unless the check or aggregate of checks total more than \$100 or unless special circumstances exist showing that the accused is a chronic violator.
2. Extradition should issue automatically in these cases: forgery, uttering, and issuing a check with no account.

Removing Mortgaged Property:

1. The amount of money involved in this type of case is felt to be of little importance. Only in exceptional circumstances should extradition be sought under this type of statute. For example, if the accused has made regular payments on the merchandise and perhaps owes only a reasonable balance, extradition should not be sought as this is clearly a civil matter. However, if the accused has purchased a vehicle or merchandise and departed the jurisdiction without making any payments the intent would seem to be clearly established and extradition should issue.

Rental Property:

1. When the accused fails to return the property, such as a motor vehicle, the same is located, and no intent to steal can be established, it would appear that this is a civil matter and extradition should not issue.
2. If, however, the accused rents the property and leaves the jurisdiction immediately or shortly thereafter for parts unknown, extradition should issue.
3. Other statutes should be employed other than the rental property statutes whenever possible, and when extradition is sought in this type of situation, a detailed affidavit should be filed with the papers supporting the request.

Misdemeanors:

1. Because of the terminology in many jurisdictions a misdemeanor may be punishable by as little as 10 days or as much as life. Consequently, the mere fact that the charge is a misdemeanor in the demanding state does not in any way restrict the Governor's right to extradite. Each case, of course, should be considered on its own merits.

II. Law Enforcement Procedure for Preparation of Complaint or Affidavit Warrant of Arrest, and Fugitive Warrant.

- A. An affidavit (or complaint) must positively charge the commission of the crime by the accused, citing the North Carolina General Statutes Section providing for the crime and must be sworn to before a magistrate. The affidavit must be more specific than "upon information and belief" or the extradition request will be denied by the asylum state.
- B. The warrant of arrest is usually attached or made a part of the complaint, and made out to the appropriate law enforcement officers in North Carolina, signed by the magistrate, whose signature must be certified by the clerk of the superior court of the county wherein the crime allegedly occurred.
- C. The fugitive warrant

1. Ordinarily the alleged fugitive is located and arrested in the asylum state before the Governor enters into the proceedings. The location and

APPENDIX V—EXTRADITION

arrest of the fugitive is a matter between law enforcement agencies in the demanding state and the asylum state. The fugitive warrant issued in the asylum state upon receipt of satisfactory information from the pertinent law enforcement agency in the demanding state.

2. The alleged fugitive may be arrested in the asylum state through an identification check, or the demanding state may forward a criminal warrant or satisfactory information to the local law enforcement officers with an address for the fugitive.
3. The fugitive is taken into custody, and the demanding state is notified.
4. The fugitive may, in writing, waive extradition before a court of record or clerk of the superior court.
5. If the fugitive waives, the law enforcement agency of the demanding state is notified to appear and receive him.
6. If the fugitive does not waive, the demanding state is notified of his refusal and advised to forward the Governor's request for rendition.
7. A fugitive warrant is prepared by the local law enforcement officials of the asylum state, and the fugitive is arraigned on that warrant. Bond may be set if it is a bondable offense and the matter is continued pending receipt of request for rendition from the Governor of the demanding state.
8. If the accused is not arrested under warrant of the Governor by expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days. If recommitted the judge or magistrate may again take bail for his appearance and surrender within the period specified.

III. Steps Taken By the Law Enforcement Officer of the Demanding State When The Fugitive Refuses to Waive Extradition.

A. Officer should interview witnesses before taking case to the solicitor to ascertain if:

1. Witnesses have changed their testimony.
2. Witnesses have received restitution.
3. Witnesses are willing to testify in court.
4. The complaint alleges the facts in the case.
 - a. All complaints used in extradition must be on direct allegation and sworn to before a magistrate.
 - b. The correctness of the complaint with regard to names and the spelling thereof, facts, dates and figures must be thoroughly checked.
5. The witnesses can identify the fugitive by photograph or other means.

B. Officer should then have an interview with the solicitor and should be prepared to present the following:

1. The facts in the case which are supported by the testimony of available witnesses.
2. The fugitive's record and information as to other outstanding charges against the fugitive.
3. Admissions made by the fugitive or co-defendants.
4. Particulars as to investigation and search.

IV. The Solicitor, In Authorizing or Refusing Applications for Extradition Must Take Certain Factors Into Consideration.

A. The various factors which should be taken into consideration are as follows:

1. The basic circumstances.
2. The character of the offense.
3. The magnitude of the offense.
4. The evidence by which it is claimed that the crime may be proved.

5. The substantive and procedural law applicable to the circumstances.
6. The character of the defendant.
7. The number of his prior convictions and the nature of the crimes there involved.
8. The probability of his committing similar crimes in other communities.
9. The probable length of time he will be incarcerated and effect of that imprisonment upon the defendant after his release in deterring further acts of crime in North Carolina as opposed to the value of an anticipated arrest, conviction and imprisonment if he returns, in keeping him away from the State of North Carolina.

These facts are all weighed against:

1. The probability of a warrant of rendition being authorized by the Governor of the state of refuge.
2. The financial cost of the defendant's return to North Carolina for prosecution.
3. Effect of a refusal upon those who may contemplate the commission of crime in this community.

B. The officer should keep the solicitor advised of new developments in the case if the solicitor agrees to prepare an application for the requisition of the fugitive.

C. The solicitor should request that the officers appointed as agents either be the investigating officer or officers who are completely familiar with the case. Officers appointed as agents are expected to hold themselves in readiness to travel at any time they receive word from the asylum state that the papers have been approved, or that they are expected to attend a hearing in the asylum state.

1. The agent should not go to the asylum state to pick up the fugitive until notified that the fugitive is ready to be delivered.
2. North Carolina will not pay for the expenses for an agent to attend a hearing before the extradition request is honored, except in the case where the District of Columbia requires that the agent be at the hearing. (See attached copy of instructions from the District of Columbia)

APPENDIX V—EXTRADITION

GOVERNMENT OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT WASHINGTON, D. C. 20001

This is to notify you that _____, wanted by your department for _____, has been apprehended here. _____ refused to return to your jurisdiction without requisition papers and has demanded an extradition hearing which our court has set for _____.

Please have your Governor's requisition papers prepared to read, and forwarded to: "The Chief Judge of the Superior Court for the District of Columbia", Fourth and E Streets N.W., Washington, D. C., 20001. These papers should include a certified copy of the statute under which the defendant is charged and the agent named in the papers to receive the defendant must personally be present at the time of the extradition hearing.

This agent and all necessary witnesses should report to the Fugitive Section, Municipal Center Building, Room 3058, 300 Indiana Avenue N. W. at 9:00 A. M. on the date specified above for the extradition hearing, and will be accompanied to the proper court. The agent should be prepared to pay a case fee of \$10.00 for the Court Filing Fee and an additional \$3.00 fee to the U. S. Marshall for each prisoner.

"For your information in the preparation of the Extradition Papers"

- I. Where the Governor's papers are based upon an indictment; you must be prepared to prove the following at a court hearing in this jurisdiction:
 1. That the defendant is substantially charged with a crime in your state: An indictment is usually sufficient in itself to establish this.
 2. That the defendant is a fugitive from justice: That is, proof that the defendant was in your state on the date of the commission of the crime charged. An indictment establishes a presumption of fugitivity and the burden is upon the defendant to overcome the presumption.
 3. Identity: That the defendant named in the Governor's papers is the person who is before the court in this jurisdiction. This is best done by sending a witness who can personally identify the defendant as the person charged in the indictment. It might also be done by a picture and other identifying information.
- II. Where, in the absence of an indictment, the Governor's papers are based upon an affidavit made before a magistrate charging the demanded person with a crime, you must be prepared to prove the same elements as above:
 1. That the defendant is substantially charged with a crime in your state: The affidavit must set forth sufficient facts, not mere conclusions, to establish probable cause under the Federal Fourth Amendment; that is, the affidavit must show facts within the personal knowledge of the affiant and of which he had reasonably trustworthy information to warrant a man of reasonable caution to believe that an offense had been committed and that the demanded person committed it.
 2. That the defendant is a fugitive from justice: Proof of fugitive would usually be satisfied by an adequate showing of probable cause under paragraph 1.
 3. Identity: The same as in the case of an indictment.
- III. Where the defendant's extradition is being sought because he has violated his parole or probation, the crime with which he is charged for extradition purposes is the original crime for which he was convicted and sentence imposed, not "Violation of Parole" or "Violation of Probation"; and the Governor's papers should include copies of indictment, judgment, docket entries, etc., to show clearly that the judgment of your court has not been satisfied.
- IV. In desertion and nonsupport cases, the wife of defendant, or other person seeking support, should be present at the extradition hearing. In addition, our Court usually requires some showing that proper relief would not be available under our Uniform Reciprocal Enforcement Support Act.

Please acknowledge receipt of this notice. If for any reason you decide not to extradite the defendant, please notify us immediately.

Sincerely,

In reply refer to:
C. I. D. No. _____

Deputy Chief of Police
Commander, Criminal Investigations Division

RULES CONCERNING APPLICATIONS FOR REQUISITION

Where Subject is Wanted for Trial: In requesting the extradition of a fugitive from justice (or other person subject to extradition) from another state to North Carolina for trial, the following documents must be transmitted to the Governor of North Carolina:

A. Application: Application for Requisition, prepared by the solicitor for the solicitorial district wherein the offense was allegedly committed. The application and supporting documents must be submitted in quadruplicate. The following must appear in the solicitor's application for requisition if a person is wanted for trial in North Carolina:

1. The full name of the subject for whom extradition is asked, properly spelled.
2. That in his opinion the ends of public justice require that the subject be brought to this state for trial, in accordance with North Carolina General Statutes 15-55 [G.S. 15A-721] et seq.
3. The [That] he believes that he has sufficient information to:
 - a. secure the conviction of the subject, or
 - b. prove that said subject has violated a condition of probation, suspended sentence, parole, or conditional release.
4. The name and address of the agent or agents proposed to receive custody of the subject and escort him to North Carolina, and a statement that the person recommended is a proper person and has no private interest in the arrest and conviction of the subject.
5. If there has been any former application for requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reason for the present request, together with the date of such prior application.
6. If the subject is known to be under either civil or criminal arrest in the asylum state, the fact of such arrest and the nature of the proceedings on which it is based, the place (with complete address) where he is in custody, and the name and address of the officer who has custody of him must be stated, if known. If out on bail, the date of hearing should be stated. If business or home address is known, it should be given. The grounds for this belief should also be stated.
7. That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceeding will not be used for any of said objects.
8. The nature of the crime charged (with a reference to the particular statute defining and punishing the same), and the approximate time, place, and circumstances of its occurrence.
9. If the subject was in North Carolina at the time the crime was allegedly committed and has since fled the state, that fact must be stated. If, on the other hand, the subject committed an act while in another state which intentionally resulted in a crime in North Carolina and is now in the state upon which requisition is asked, that fact must likewise be stated.
10. If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.
11. The application must be verified by the officer who makes it before the clerk of the superior court, or other proper official, of the county wherein the crime allegedly occurred or the subject escaped confinement or violated the terms of his probation or bail. To this verification must be attached the certificate of the clerk of court as to the official character of the solicitor or other officer making the application, the certificate of a judge of superior or district courts as to

the official character of the clerk, and the certificate of the clerk as to the official character of the judge. (The certificates of the clerk and that of the judge may be combined with their certificates as to other matters in connection with the supporting documents). (While the Uniform Extradition Act requires no certification of the application for requisition beyond the verification by the solicitor, it is considered advisable to attach the clerk's and judge's certificates because some states refuse to honor a requisition when these certificates are not attached, and some judges in other states will not permit the extradition of a person when these certificates are not attached to the application for requisition).

B. Supporting Documents: A certified copy of the following must be attached to each application:

1. The indictment returned, or
2. The complaint or affidavit made before a judge or magistrate, stating the offense with which the subject is charged, showing probable cause, together with a certified copy of the warrant which was issued thereon.

A *capias* alone will not suffice. Where a warrant accompanies the application, the official character of the official who took the affidavit or complaint and issued the warrant, must be certified by the clerk of superior court of the county wherein the crime allegedly occurred.

The official character of the clerk must be certified by a judge of the superior court, and the official character of the judge must be certified by the clerk.

The authenticity of the copies of the indictment or of the complaint or affidavit and warrant must be certified by the clerk with custody of the original records; or in the case of a complaint or affidavit and warrant it may be certified by the judge or magistrate who took the complaint or affidavit and issued the warrant. The official character of the magistrate or judge must be certified by the clerk of superior court, that of the clerk by the judge, and that of the judge by the clerk.

Where the supporting document is a complaint or affidavit made before a judge or magistrate, the warrant must be filled out and directed to a North Carolina officer, even if the subject is known to be in another state. The judge or magistrate issuing the warrant has no authority to order an arrest to be made by an officer of another state, and where the warrant is directed to an officer outside of North Carolina, the asylum state may refuse to honor the accompanying requisition of the Governor of North Carolina.

The indictment or the affidavit or complaint made before the magistrate must substantially charge the person demanded with having committed a crime under the laws of North Carolina. General Statutes of North Carolina should be cited.

C. Special Affidavits: In all cases of fraud, false pretense, embezzlement, or forgery, when made a crime by the common law or any penal code or statute, there must be included the affidavit of the principal complaining witness or informant

1. that the application is made in good faith, for the sole purpose of punishing the accused, and
2. that he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any private purpose, and will not directly or indirectly use the same for any of said purposes, or a sufficient reason must be given for the absence of such affidavit.

D. Additional Affidavits: The solicitor may attach to his application for requisition such additional affidavits as he may think necessary; such as, affidavits from any persons who are familiar with the details of the crime and who can thus corroborate the allegations made in the complaint or indictment.

E. In addition to the foregoing, certain additional items often prove of aid in securing extradition, and may well be included with the application. Among these items are the following:

1. A photograph of the fugitive. This will be of special aid in connection with the identification feature hereinafter discussed. With the photograph should be an affidavit to the effect that the person there depicted is the one who is charged with the crime.
2. A sworn statement, which may well form a part of the solicitor's application, to the effect that the fugitive was physically present in the demanding state at the time of the commission of the crime. This is important because many states refuse extradition in cases like conspiracy, desertion or nonsupport where the offender was not physically present in the state wherein the crime is charged.
3. A copy of the criminal statute under which the accused is charged. This affords the Governor of the asylum state easy reference to the statute involved and allows him to see whether or not the indictment or complaint substantially charges a violation of such statute.

II. Where Subject Escapes Custody: (Escapees may also be Violators of Parole by Absconding and Violators of Conditional Release)

Where it is necessary to extradite a person who has been convicted of any crime and has thereafter escaped to another state, the application for requisition may be made by the solicitor if the fugitive was in jail ready to be transferred to serve a term in the Department of Correction, or if the fugitive was out of jail on appeal. Where the fugitive escapes from the Department of Correction while serving his term, the warden or the Commissioner of Correction, or proper official, may make the application for his return. The application in such case shall be accompanied by four certified copies of each of the following:

- A. The indictment (or the warrant, if the subject was tried on the warrant).
- B. The judgment of conviction and sentence upon which the person was being held at the time of his escape.
- C. The affidavit of the officer from whose custody he escaped, showing such escape and the circumstances attending the same.
- D. The record of escape, which includes the transcript and fingerprints.

The authenticity of the indictment (or warrant) and the record of conviction and sentence upon which the person is being held must be certified by the clerk having custody of the original records, and the character of the official making affidavit as to the subject's escape must be certified by the clerk of superior court or proper official. The official character of the certifying clerk must be certified by a judge of superior court, and that of the judge by the clerk.

III. Probationers: Where it is necessary to bring back to North Carolina a person on probation who has violated the terms of his probation and left the state, the application for requisition and accompanying papers may be prepared by the solicitor of the district which embraces the county wherein the subject was serving his probation, or may be prepared by the State Probation Commission in behalf of the solicitor of the proper district, and for his signature.

IV. Air Force, Army, Marine or Naval Personnel: Where it is desired to requisition a person who is on active duty with the Air Force, Army, Marine Corps or Navy, it is necessary that the requisition also be accompanied by an agreement by the appropriate authorities:

- A. That the officer in charge of the subject will be informed of the outcome of any trial, and
- B. That if the Armed Forces authorities desire his return, the subject will, on acquittal or completion of sentence
 1. Be returned to the Armed Forces authorities at the place of delivery, or

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2. Be issued transportation to the nearest receiving ship, station, or barracks at the expense of the authority asking requisition.

In all cases where the costs and expenses incident to requisition would be borne by the county, i.e., where the crime charged is a misdemeanor or where no requisition is used, the solicitor or other officer making application for requisition must prepare and execute an agreement to this effect. If the crime is a felony and a requisition is issued by the Governor's Office, then the agreement will be prepared and executed by the Governor. The agreement may take the form of a letter to the Secretary of the appropriate branch of service, setting out the required promises. The requisition and the Governor's papers are mailed to the Governor's office of the asylum state. (See attached agreement)

AGREEMENT BETWEEN THE GOVERNOR OR SOLICITOR AND THE ARMED FORCES

EXAMPLE

February 30, 1975

TO WHOM IT MAY CONCERN:

In consideration of the delivery of (*name of fugitive, grade, service number, and branch of service of armed forces*) to (*county*) at (*city and state*), for trial upon the charge of (*list charge or charges*), I hereby agree, pursuant to the authority vested in me as (*Governor or Solicitor*), that the commanding officer in charge of the (*branch of service, location of base or station, city and state*), and the Secretary of the (*branch of military service*) will be informed of the outcome of the trial and that said (*name of fugitive*) will be returned to the (*list appropriate branch of service*) authorities at the aforesaid place of his delivery or to such other place as may be designated by the (*name of armed forces involved*) or issued transportation to the nearest receiving (*ship, station or base*) without expense to the United States or the person delivered immediately upon the completion of his trial upon the charge aforesaid in the event that he is acquitted upon said trial, or immediately upon satisfying the sentence of the court in the event that he is convicted and a sentence imposed, or upon other disposition of his case, provided that the (*name of armed forces involved*) authorities shall then desire his return.

.....
Governor of North Carolina

or

.....
Solicitor

- V. Fugitives Out of the United States (International Extradition): The solicitor sends his demand to the Governor's office. It is processed, the Governor's endorsement added, addressing it to the Secretary of State, and mailed to the Secretary of State, Washington, D. C.
- VI. Fugitives from Justice in Possessions: The solicitor sends his demand to the Governor's office. It is processed, the Governor's endorsement added, addressing it to the Governor of the Possession, and mailed directly to the Governor of the Possession.
- VII. Fugitives from Justice in the District of Columbia: The solicitor sends his demand to the Governor's office where it is processed, the Governor's endorsement added, and addressed to the Chief Judge of the Superior Court for the District of Columbia. The District of Columbia has given instructions it wishes to be followed in the letter shown in Section IV.
- VIII. Renewal of Application: Upon renewal of an application (for example, where prior requisition has proved ineffective because the subject was not to be found in the state upon which requisition was made), new or re-certified copies of papers in conformity with these rules must be furnished.
- IX. Nonsupport Cases: Solicitors are requested not to send papers to the Governor for charges of nonsupport unless the Uniform Reciprocal Enforcement of Support Act (G.S. 52A-1 et seq.) has been used unsuccessfully. If it has, and [an] affidavit to this effect should be attached to each set of papers. There are always exceptions to the rule, however, and if the solicitor feels that he has a good enough case, he can present it. In cases where a man has been sentenced for nonsupport and escapes before he serves the sentence, usually the

solicitor goes ahead and sends his demand to the Governor, who considers it favorably. In cases where a man violates probation in connection with nonsupport, the solicitor should feel free to go ahead and send his papers to the Governor. In any case involving nonsupport where a court of competent jurisdiction has been used without effect, the Governor would normally consider a request in such case favorably. All of the states have adopted the Act.

- X. **Additional Agents:** When it is deemed necessary for more than one extradition agent to be designated to escort a subject from another state to this state in a case of felony, the solicitor or other officer making the application must file with his written application for requisition an affidavit setting forth in detail the reasons why it is necessary to have more than one extradition agent so designated. Among other things (but not by way of limitation), the affidavit must set forth whether or not the subject is a dangerous person, his previous criminal record (if any), and any record of the subject on file with the Federal Bureau of Investigation or with the prison authorities of this state. As a further reason for more than one extradition agent to be designated, it may be shown in the affidavit the number of subjects to be brought to this state. If the Governor finds from his own investigation and from the information made available to him that more than one extradition agent is necessary, he may designate more than one extradition agent for the purpose. If the fugitive is a female, one of the two agents must be a female, if two are sent; if one is sent, she must be a female.
- XI. **Agent Must Await Notice:** The agent or agents named in the requisition should not go to the state on which demand is made until action has been taken by the Governor of that state and the agent is so notified by the office of the Governor of North Carolina or proper authorities of the state on which the demand is being made. The State of North Carolina will not be liable for any expenses incurred by the agent or agents in the way of travel and subsistence costs prior to the date action is taken by the Governor of the state on which the demand is made. Exceptions are made if the District of Columbia demands it.
- XII. **Return of the Agent's Commission:** Immediately after the agent has completed his assignment by delivering the subject to the proper officer in North Carolina, he must make return on the form printed on the back of his commission, and must have the officer into whose custody the subject was delivered fill in and sign the accompanying receipt. If the subject is not taken into custody and brought back to North Carolina by the agent, he must make return of that fact and the reasons therefore [therefor] on the back of his commission. The agent's commission must be returned to the Governor's office with proper return made thereon before the agent will be reimbursed by the Governor's office for his expenses.
- XIII. **Costs and Expenses.**
 - A. **When the State Pays:**
 1. If the crime charged against the subject is a felony and requisition is issued by the Governor of North Carolina, reimbursement for expenses incurred in bringing the subject back to this state will be made out of the state treasury on a voucher paid out of the fugitives from justice fund, Code 14101, by the North Carolina Governor's Office budget officer.
 2. The state will also be responsible for expenses incurred in the return of fugitives charged with felonies if the extradition process is not used. The Governor's requisition is issued, but thereafter extradition is waived by the subject, a copy of the waiver should be sent to this office,

together with the agent's commission, attached to the expense account, submitted in triplicate; and the state will pay the expense. Copy of and waiver and agent's commission are at the end of this article. Copy of expense account form is also attached, which can be secured from the Governor's office. A copy of extradition fees list charged by the various states is also attached to this article.

3. The law enforcement agencies in the cities or counties of North Carolina are required to contact the Governor's office for permission to send two agents if necessary, instead of the usual one agent. If two agents have to be sent, the Sheriff, Chief of Police, or the solicitor must, in the form of an affidavit, state the necessity for two agents, to return the fugitive, which must be attached to the expense account in triplicate. The State Auditor, who approves all expense accounts in this respect, will in turn return the expense account to the Governor's office for payment. The Governor's office will pay the expenses of one agent at all times if the expense account is in order, but will pay for two agents only if the affidavit of explanation is satisfactory. The guard's fees should be included on the agent's expense account.
4. The Governor's office will pay for only one trip to return the fugitive to North Carolina, except in extreme cases where a second trip is necessary or in the special case of Washington, D. C., where the agent is required to attend a hearing.
5. The agent must attach a copy of the waiver of extradition by the felon to each copy of the expense account.
6. The agent must provide proof that he returned the fugitive; and this could be in the form of an affidavit or a form provided by the office of the law enforcement agency. If the extradition process is used, the agent should make return on the back of the agent's commission, and return it to the Governor's office with his expense account.

When county pays: In all other cases (i.e., where the crime charged is a misdemeanor), reimbursement will be made out of the treasury of the county wherein the crime is alleged to have been committed, according to such regulations as the board of county commissioners of that county may promulgate.

Expenses allowed: If the extradition agent or agents or person or persons designated to return a fugitive or fugitives from another state to this state shall elect to travel by automobile, a sum not exceeding eleven (11¢) per mile may be allowed in lieu of all travel expense, and will be paid upon a basis of mileage for the complete trip. If travel is by train, bus, or other public conveyances, including use of taxis, the actual fare is allowed. This will include pullman fare. If a county of [or] city-owned car is used, only ordinary auto expenses, such as gas and oil, will be allowed. No expenses for witnesses are allowed. The maximum allowance by the State of North Carolina for out-of-state expenses for hotel and meals (and tips) is actual cost, not to exceed \$25.00 per day for each person, including the fugitive. Telephone calls will be paid for if necessary in connection with the State's business. Calls costing over \$1.00 must be explained. In all cases, the expenses for which repayment or reimbursement may be claimed shall consist of the reasonable and necessary travel expense and subsistence costs of the extradition agent or fugitive office, as well as the fugitive, subject to the limitations indicated above, together with such legal fees as were paid to the officials of the state on whose governor the requisition is made. The Governor's office pays requisition fees in cases of felonies only; in cases of misdemeanors, the county is responsible for payment of requisition fees. As previously mentioned, the agent should put the expenses of the fugitive and/or guard on his expense account.

- XIV. Expense Accounts:** Expense accounts must be submitted to the Governor's office in triplicate. The person or persons designated to return the fugitive will not be reimbursed for any expenses in connection with any requisition or extradition proceedings unless the expenses are itemized properly on the required expense forms, and the statement thereof sworn to under oath. The agent will not be reimbursed unless the receipts for the following are attached: Lodging (hotel), tolls, airplane fares, train fares or bus fares, or auto expenses. The Governor has the authority, upon investigation, to increase or decrease any item or expenses shown in the sworn statement, or to include items of expense omitted by mistake or inadvertence. The decision of the Governor as to the correct amount to be paid for such expenses or reimbursements is final. At the time the expense account is filed, the agent must return his commission with the proper return made thereon, in order to be reimbursed by the Governor's office for his expenses. As requested previously, the waiver of extradition must be attached, if the agent's commission is not used, to the expense account, along with the requested receipts mentioned above. The Governor's office submits the expense account for approval to the State Auditor in the Administration Building. Recommended copy of travel expense form to be used is attached. These forms can be obtained from the State Budget Officer, or law enforcement agencies can have some printed in their own locality.

EXTRADITION FEES

REQUIRED BY THE VARIOUS STATES

The North Carolina Governor's Office pays for the fee required by the other states in all cases where the extradition process is used. If the process is not used, in cases of felonies where the fugitive waives, the agent can include this fee under other expenses on his expense account.

MISSOURI	\$ 2.50
MONTANA	\$ 5.00
NORTH DAKOTA	\$ 5.00
OKLAHOMA	\$ 2.50
SOUTH DAKOTA	\$ 3.00
WEST VIRGINIA	\$ 2.00
WYOMING	\$ 5.00
*DISTRICT OF COLUMBIA	\$10.00 + \$3.00

*In the case of D. C., the agent is required to pay cash fee of \$10.00 for court filing fee, and an additional \$3.00 cash fee to the U. S. Marshal for each prisoner. North Carolina will reimburse the agent for this fee if he will provide for it in his expense account.

1979 CUMULATIVE SUPPLEMENT

APPENDIX V—EXTRADITION

NORTH CAROLINA In the _____ Court

_____ COUNTY WAIVER OF EXTRADITION

I, _____, having been arrested in this State and charged with having committed the crime of _____ in the County of _____ in the State of _____, and understanding that authorities from such State are demanding my return for trial in said State, do hereby waive the issuance and service of warrants provided for in Sections 15-61 and 15-62 of the North Carolina General Statutes, and all other procedure incidental to extradition, and further have stated personally before the undersigned Clerk (Judge) that I consent to return to the demanding State upon arrival of authorities from said demanding State, and do thus waive extradition; and that before this waiver was executed and subscribed, the undersigned Clerk (Judge) did inform me of my rights to the issuance and service of a warrant of extradition and of my right to obtain a writ of habeas corpus as provided in Section 15-64 of the North Carolina General Statutes.

_____ (SEAL)

I, _____, Clerk of the Superior Court (Judge of _____ Court) of _____ County, State of North Carolina, the same being a court of record, do certify that _____ appeared personally before me this day and signed the above waiver of extradition in my presence, after being informed by me of his legal rights with respect thereto.

Witness my hand and seal of court this _____ day of _____, 19 _____.

Clerk of Superior Court (Judge of _____
Court) of _____ County
State of North Carolina

Ref: G.S. 15-80

NOTE: Original copy goes to the Office of Governor of North Carolina; a copy must be given to agents of the demanding State.

Also, it is always preferred that a Waiver be signed before a Judge; however, the Clerk's signature is acceptable.

APPENDIX V—EXTRADITION

DC-127
Rev. 2-71

STATE OF NORTH CAROLINA



AFFIDAVIT AND REQUEST

FOR DETENTION OF FUGITIVE FROM JUSTICE

PURSUANT TO SECTION 13 OF THE UNIFORM CRIMINAL EXTRADITION ACT

(ARREST PRIOR TO REQUISITION)

STATE OF NORTH CAROLINA

COUNTY OF _____

This day _____, personally
appeared before me, _____, Clerk of the
Superior Court of _____ County, North Carolina, and after
first being duly sworn, stated that in the _____ Court for
the County (City) of _____, in the State of North
Carolina, on the _____, 19____, the subject
_____, alias _____

was convicted of _____, and was sentenced
to confinement in the State Department of Correction, for a term of _____
_____ as shown by certified copy of fingerprint and
transcript attached, that the subject was accordingly confined in the _____
_____, from which
he escaped on the _____ day of _____, 19____, without having
completed his sentence; and that the subject is now in the State of _____
_____.

Officer In Charge

Sworn to and subscribed before me this

the _____ day of _____, 19____.

Clerk of Superior Court

_____ County, North Carolina

1979 CUMULATIVE SUPPLEMENT

Form BD-403S
50M-5-73

STATE OF NORTH CAROLINA

REQUEST FOR

REIMBURSEMENT OF TRAVEL AND OTHER EXPENSES INCURRED IN THE DISCHARGE OF OFFICIAL DUTY-INCLUDING PER DIEM

INSTRUCTIONS TO CLAIMANT: Prepare in three (3) copies. Attach all necessary receipts and other supporting documents to this form and submit the original and one (1) copy to your Budget or Business office. Retain one (1) copy.

Department or Institution		Division	
Payee's Name		Title	Headquarters (City)
Payee's Address		Date	Total Cost
From	Period covered by this voucher To	Date of Out-of-State Travel Auth.	Less Advance
			Reimbursement

This is a true and accurate statement of expenses incurred in the service of the State.

I certify that the expenses incurred are necessary and proper and amounts claimed are just and reasonable.

(CLAIMANT)

(HEAD)

TRAVEL (SHOW EACH CITY VISITED)			TRANSPORTATION			SUBSISTENCE			OTHER EXPENSES	
DAY	FROM	TO	(1) MODE	DAILY PRIVATE CAR MILEAGE	AMOUNT	(2) TYPE	AMOUNT	(3) DAILY TOTALS	EXPLANATION	AMOUNT
			P			B				
			A	————→		L				
			O	————→		D				
			R	————→		H				
						G				
			P			B				
			A	————→		L				
			O	————→		D				
			R	————→		H				
						G				
			P			B				
			A	————→		L				
			O	————→		D				
			R	————→		H				
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			R	————→		H				
						G				
			P			B				
			A	————→		L				
			O	————→		D				
			R	————→		H				
						G				

APPENDIX V—EXTRADITION

FORM GOV. 1

State of North Carolina



APPLICATION FOR REQUISITION (NORMAL)

TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA, _____:
THE UNDERSIGNED, _____, SOLICITOR (or ASSISTANT
SOLICITOR) of the _____ Solicitorial District of North Carolina,
_____ hereby makes this verified application for the
requisition of _____ Address _____ a Fugitive from Justice of this State, charged with
the CRIME of _____ in the COUNTY of _____

IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:

1. That the FULL NAME of the person for whom requisition is asked is _____
2. That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina for trial at public expense.
3. That he believes that he has sufficient evidence to secure the conviction of the subject.
4. That the name of the AGENT _____ proposed to receive the subject from the proper authorities of the State of _____ and bring said subject to the State of North Carolina for trial is (are) _____
Name and Address _____

AND that the person _____ named as AGENT _____ is (are) a proper person _____ and that he (they) has (have) no private interest in the arrest and conviction of the subject.

- 5a. That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.
- 5b. That, there HAS BEEN a former request for the requisition of the subject growing out of the same transaction herein alleged: _____
Date of Prior Application _____

Explanation of Reasons for Present Request for Requisition

6. That the subject is now under ARREST in the State of _____ and in the custody of _____
Name and Address _____ and the grounds for such belief is as follows: _____
(and has been released on bail from this custody, is scheduled for a hearing in _____ Place _____ at _____ Time _____ and is presently residing at _____ Home Address or Business Address _____);
AND that if the subject is under either civil or criminal arrest in the State of _____ for other than the crime herein charged, the facts are unknown to the maker of this application.

7. That this application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings will not be used for any of said objects.
8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of trial on the charge of committing the CRIME of _____

_____, as defined in North Carolina GENERAL
STATUTES _____, as set forth in:
Code—Section _____

- a. WARRANT, heretofore issued against him, accompanied by COMPLAINT (Affidavit to the facts thereof by a person having actual knowledge thereof), as per quadruplicate copies hereto attached.

1979 CUMULATIVE SUPPLEMENT

FORM GOV. 1

APPLICATION FOR REQUISITION (NORMAL)

PAGE TWO

b. INDICTMENT, heretofore found against subject on the _____ day of _____, 19____, by the Grand Jurors for the State of North Carolina in and for the County of _____, attending the Superior Court of the said county, which Indictment is now pending against the subject, and quadruplicate original copies of which indictment are hereto attached.

9a. That the alleged Crime was committed in _____ Place-Date _____; and That said subject was personally and physically present in _____ North Carolina, at the time of the commission of the alleged crime, and thereafter the subject fled from the State of North Carolina to avoid arrest and prosecution.

9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA at the time of the commission of the crime of which he is charged, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act, G. S. 15-60, which your Applicant is informed has been adopted by the State of _____; and that the subject, while in the State of _____, committed an Act, to wit _____, which intentionally resulted in the commission of a crime, to wit _____, in the State of North Carolina.

10a. That this application was made as soon as the subject could be located.

10b. That there has been a considerable lapse of time since the date of the alleged crime, explanation of which is as follows: _____

11a. That this application is verified by _____ Name of Solicitor or Assistant Solicitor as aforesaid, and is executed in quadruplicate, and is accompanied by certified copies of the WARRANT heretofore issued against the said subject by _____, a duly appointed, qualified, and acting _____ Magistrate, Clerk of Court, or Judge, and COMPLAINT. Affidavit of identification, and other certifications by proper authorities that the Signers of the Documents are qualified.

11b. That this application is verified by _____ Name of Solicitor or Assistant Solicitor as aforesaid, and is executed in quadruplicate, and is accompanied by certified copies of the INDICTMENT heretofore found against the said subject by the Grand Jurors in the State of North Carolina in and for the County of _____, attending the Superior Court of said county, which indictment is now pending against the subject; and other certifications by proper authorities that the Signers of the Documents are qualified.

Solicitor (Assistant Solicitor) of the _____ Solicitorial District of North Carolina

SEAL

Sworn to and subscribed to before me, this the _____ day of _____, 19____

_____, Clerk, Superior Court or Proper Official

County and Address _____

- (1) This application may be used for all fugitives with exception of: Violators of Conditions of Probation, Parole, or Conditional Release; Escapers or Bail Violators after confinement.
- (2) Select the (a) or (b) which applies in your case, as follows: 5a. b.; 5a. b.; 9a. b.; 10a. b.; 11a. b. Leave what you do not use vacant.
- (3) Attach copy of applicable Statute.

APPENDIX V—EXTRADITION

FORM GOV. 2

State of North Carolina



APPLICATION FOR REQUISITION

(After Conviction)

TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA, _____

THE UNDERSIGNED, _____
Commissioner of Correction, Solicitor (Assistant Solicitor)

District and Address _____

hereby makes this verified application for the requisition of _____

Fugitive from Justice of this State, charged in the County of _____

with the _____
Crime of Escape or Violation of terms of Parole, Conditional Release, Probation, Bail,

as defined in North Carolina General Statutes _____, and who is now in the jurisdiction

of the State of _____

IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:

1. That the FULL NAME of the person for whom requisition is asked is _____

2. That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina at state or county expense in accordance with N. C. General Statutes 15-55 et seq.

3. That he believes that he has sufficient evidence to secure (a) the conviction of the subject; OR (b) to prove that said subject has violated the conditions of _____

4. That the name of the AGENT _____ proposed to receive the subject from the proper authorities of the State of _____ and bring said subject to the State of North Carolina for (a)

trial OR (b) hearing is (are) _____
Name & Address _____

AND that the person named as AGENT _____ is (are) a proper person and that he (they) has (have) no private interest in the arrest and disposition of said fugitive.

5a. That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.

5b. That, there HAS BEEN a former request for the requisition of the subject growing out of the same transaction herein alleged: _____
Date of Prior Application _____

Explanation of Reasons for Present Request for Requisition _____

6. That the subject is now under ARREST in the State of _____ and in the custody of _____
Name & Address _____

and the grounds for such belief is as follows: _____

(and has been released on bail from this custody, is scheduled for a hearing in _____
Place _____

at _____, and is presently residing at _____
Time _____ Home Address or Business Address _____

); AND that if the subject is under either civil or criminal

arrest in the State of _____ for other than the crime herein charged, the facts are unknown to the maker of this application.

7. That this application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt, or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings, or hearing, will not be used for any of said objects.

1979 CUMULATIVE SUPPLEMENT

FORM GOV. 2

APPLICATION FOR REQUISITION (After Conviction)

PAGE TWO

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of (a) TRIAL or (b) HEARING on the charge of (a) _____ (Escape)

OR for violation of the conditions of (b) _____ Parole, Conditional Release, Probation, Bail as defined in North Carolina General Statutes _____ and as set forth in, and attached in quadruplicate hereto:

(a) Warrant and Affidavit for Escape (Solicitor), dated _____; OR Certified Statement of Officer from whose custody Fugitive escaped (Dept. of Social Rehabilitation and Control), dated _____;

(b) Probation Judgment imposed and dated _____;

(c) Conditional Release imposed and dated _____;

(d) Certificate of Parole dated _____;

(e) Allowance of Bail dated _____;

Details (Escape Date; Revocation Date): _____;

AFTER HAVING BEEN CONVICTED OF THE FOLLOWING CRIME (Show Name of Crime; N.C.G.S. citation; Date; Place; Judgment; Sentence): _____

9a. That said subject was personally and physically present in _____ County or City North Carolina, at the time of the commission of the alleged crime or violation; and thereafter, the subject fled from the State of North Carolina to avoid arrest and prosecution.

9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA, at the time of the alleged VIOLATION, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act, G. S. 15-60, which your Applicant is informed has been adopted by the State of _____; and that the subject, while in the State of _____, committed an Act, to wit: _____, which intentionally resulted in the violation of _____ in the State of North Carolina.

10a. That this application was made as soon as the subject could be located.

10b. That there has been a considerable lapse of time since the date of the alleged crime or charge, explanation of which is as follows: _____

11. That this application is verified, as aforesaid; is executed in quadruplicate; and is accompanied by the following certified documents:

(a) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence upon which subject was being held at time of escape or violation of conditions of bail. In addition, Solicitor: Warrant and Affidavit for Escape; Department of Social Rehabilitation and Control: Statement of Officer from whose custody fugitive escaped, and other records, if available, certified to by the Division of Correction of the Department of Social Rehabilitation and Control. (Fingerprint, FBI Transcript) — Escapees; Bail Violators.

APPENDIX V—EXTRADITION

FORM GOV. 2

APPLICATION FOR REQUISITION (After Conviction)

PAGE THREE

(b) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence; (certified to by Clerk of Court). (And other records, certified to by the Division of Correction of the Department of Social Rehabilitation and Control, such as: Fingerprints, FBI Transcript; and Other Records, certified to by the Board of Paroles, such as: (a) Certificate of Parole and Revocation of Parole; (b) Certificate of Conditional Release and Revocation of Conditional Release.)—Violators of Parole and Conditional Release.

(c) Warrant and Affidavit or Indictment; Organization of Court; Probation Judgment; Probation Violation Warrant and Order for Capias; and Capias Instantan.—Violators of Probation.

Name and Title of Proper Official

SEAL

Sworn to and subscribed to before me, this the

_____ day of _____, 19____

Clerk, Superior Court or Proper Official

County and Address

- (1) This application may be used for: Escapees from the Division of Correction of the Department of Social Rehabilitation and Control, G. S. 148-45; Escapees, County and Municipal, G. S. 14-256; Violators of terms of: Probation, G. S. 15-200; Parole by Absconding, G. S. 148-61.1; Conditional Release, G. S. 148-42, or violation of conditions of bail, all of which have been committed after conviction or confinement.
- (2) Select the appropriate subsection which applies in Sections 3, 4, 5, 8, 9, 10, and 11.
- (3) Attach copy of applicable Statute for Escape or Violation.

1979 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form 1

NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT AND OF RIGHT TO REQUEST DISPOSITION

Inmate _____ No. _____ Inst. _____

Pursuant to the Agreement on Detainers, you are hereby informed that the following are the untried indictments, informations, or complaints against you concerning which the undersigned has knowledge, and the source and contests of each.

You are hereby further advised that by the provisions of said Agreement you have the right to request the appropriate prosecuting officer of the jurisdiction in which any such indictment, information or complaint is pending and the appropriate court that a final disposition be made thereof. You shall then be brought to trial within 180 days, unless extended pursuant to provisions of the Agreement, after you have ceased to be delivered to said prosecuting officer and said court written notice of the place of your imprisonment and your said request, together with a certificate of the custodial authority as more fully set forth in said Agreement. However, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Your request for final disposition will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against you from the state to whose prosecuting official your request for final disposition is specifically directed. Your request will also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein and a waiver of extradition to the state of trial to serve any sentence there imposed upon you, after completion of your term of imprisonment in this state. Your request will also constitute a consent by you to the production of your body in any court where your presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which you are now confined.

Should you desire such a request for final disposition of any untried indictment, information or complaint, you are to notify _____ of the institution in which you are confined.

You are also advised that under provisions of said Agreement the prosecuting officer of a jurisdiction in which any such indictment, information or complaint is pending may institute proceedings to obtain a final disposition thereof. In such event, you may oppose the request that you be delivered to such prosecuting officer or court. You may request the Governor of this state to disapprove any such request for your temporary custody but you cannot oppose delivery on the grounds that the Governor has not affirmatively consented to or ordered such delivery.

DATED: _____
(insert name and title of custodial authority)

BY: _____
Warden - Superintendent - Director

RECEIVED

DATE _____
INMATE _____ NO. _____

In Triplicate White copy signed by inmate and unit head to be returned to Records Section, yellow copy signed by inmate and unit head for field jacket, pink copy for inmate.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form 2

INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR DISPOSITION OF INDICTMENTS, INFORMATIONS OR COMPLAINTS

TO: _____, Prosecuting Officer, _____ (jurisdiction)
_____, Court _____ (jurisdiction)

And to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

You are hereby notified that the undersigned is now imprisoned in

_____ at _____ (institution) (town and state)

and I hereby request that a final disposition be made of the following indictments, informations or complaints now pending against me:

Failure to take action in accordance with the Agreement on Detainers, to which your state is committed by law, will result in the invalidation of the indictments, informations or complaints.

I hereby agree that this request will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against me from your state. I also agree that this request shall be deemed to be my waiver of extradition with respect to any charge or proceeding contemplated hereby or included herein, and a waiver of extradition to your state to serve any sentence there imposed upon me, after completion of my term of imprisonment in this state. I also agree that this request shall constitute a consent by me to the production of my body in any court where my presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which I now am confined.

If jurisdiction over this matter is properly in another agency, court or officer, please designate the proper agency, court or officer and return this form to the sender.

The required Certificate of Inmate Status and Offer of Temporary Custody are Attached.

DATED: _____

(inmate's name and number)

The inmate must indicate below whether he has counsel or wishes the court to appoint counsel for purposes of any proceedings preliminary to trial which may take place before his delivery to the jurisdiction in which the indictment, information or complaint is pending. Failure to list the name and address of counsel will be construed to indicate the inmate's consent to the appointment of counsel by the appropriate court in the receiving state.

A. My counsel is _____ (name of counsel)

whose address is _____ (street, city and state)

B. I request the court to appoint counsel.

(inmate's signature)

Five copies, if only one jurisdiction within the state involved has an indictment, information or complaint pending. Additional copies will be necessary for prosecuting officials and clerks of court if detainers have been lodged by other jurisdictions within the state involved. One copy for the inmate. One signed copy for the Consolidated Records section. Signed copies must be sent to the Agreement Administrator of the state which has the prisoner incarcerated, the prosecuting official of the jurisdiction which placed the detainer, and the clerk of the court which has jurisdiction over the matter. The copies for the prosecuting officials and the court must be transmitted by certified or registered mail, return receipt requested.

1979 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form 3

CERTIFICATE OF INMATE STATUS

RE: _____
 (inmate) (number) (institution) (location)

The [N C Prison Department] hereby certifies:

1. The term of commitment under which the prisoner above named is being held:
2. The time already served:
3. Time remaining to be served on the sentence:
4. The amount of good time earned:
5. The date of parole eligibility of the prisoner:
6. The decisions of the Board of Parole relating to the prisoner: (if additional space is needed use reverse side)
7. Maximum expiration date under present sentence:
8. Detainers currently on file against this inmate from your state are as follows:

DATED: _____

N. C. PRISON DEPARTMENT

BY: _____
 DIRECTOR

Five Copies in case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form 2. In the case of a request initiated by a prosecutor under Article IV, copy of this Form should be sent to the prosecutor upon receipt by the Consolidated Record Section of Form 5. Copies also should be sent to all other prosecutors in the same state who have lodged detainers against the inmate. One copy for the inmate. One copy main jacket, one copy field jacket.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form IV OFFER TO DELIVER TEMPORARY CUSTODY

Date _____

TO: _____ Prosecuting Officer
(Insert Name and Title if Known)

(Jurisdiction)

and to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

RE: _____ Number _____
(Inmate)

Dear Sir:

Pursuant to the provisions of Article V of the Agreement on Detainers between this state and your state, the undersigned hereby offers to deliver temporary custody of the above-named prisoner to the appropriate authority in your state in order that speedy and efficient prosecution may be had of the indictment, information or complaint which is [described in the attached inmate's request] [described in your request for custody of _____].
(Date)

[The required Certificate of Inmate Status is enclosed.] [The required Certificate of Inmate Status was sent to you with out letter of _____]
(Date)

If proceedings under Article IV (d) of the Agreement are indicated, an explanation is attached.

Indictments, informations or complaints charging the following offenses also are pending against the inmate in your state and you are hereby authorized to transfer the inmate to custody of appropriate authorities in these jurisdictions for the purposes of disposing of these indictments, informations or complaints.

Offense	County or Other Jurisdiction
_____	_____
_____	_____
_____	_____

If you do not intend to bring the inmate to trial, will you please inform us as soon as possible?

Kindly acknowledge.

State Department of Correction
(Name and Title of Custodial Authority)

By: _____
(Director)

(Institution and address)

A. My counsel is _____
(Name of Counsel)
whose address is _____
(Street, City and State)

B. I request the court to appoint counsel.

(Inmate's Signature)

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form II. In the case of a request initiated by a prosecutor, this Form should be completed after the Governor has indicated his approval of the request for temporary custody or after the expiration of the 30 day period. Copies of this Form should then be sent to all officials who previously received copies of Form III. One copy also should be given to the prisoner and one copy should be retained by the warden. Copies mailed to the prosecutor should be sent by certified or registered mail, return receipt requested.

1979 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form V REQUEST FOR TEMPORARY CUSTODY

TO: _____
(Warden, Superintendent, Director) (Institution)

(Address)

Please be advised that _____, who is presently an inmate of your institution, is under [indictment] [information] [complaint] in the _____ (Jurisdiction) _____ (Title of Prosecuting Officer) of which I am the _____

Said inmate is therein charged with the [offense] [offenses] enumerated below:

Offense _____

I propose to bring this person to trial on this [indictment] [information] [complaint] within the time specified in Article IV (c) of the Agreement.

In order that proceedings in this matter may be properly had, I hereby request temporary custody of such person pursuant to Article IV (a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

Signed _____

Title _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV (a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: _____ Signed _____ (Judge)

Five copies. Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form 6

EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR RECEIVING STATE

TO: _____
Administrator of the Agreement on Detainers _____
_____ is confined in _____ (institution)
_____, and will be taken into custody at the institution on _____
(address) _____
_____ for return to this jurisdiction for
trial on or about _____. In accordance with Article V (b), I have designated _____
whose signature appears below as agent to return the prisoner.

(prosecuting official)

(agent's signature)

TO: Warden _____
In accordance with the above representation and the provisions of the Agreement on Detainers, _____
_____ is hereby designated as agent for this state to return _____
(agent) _____
_____ for trial
(inmate)

Administrator

In quadruplicate. All copies, signed by the prosecutor and the agent should be sent to the Administrator in the receiving state. After signing all copies, the Administrator should retain one for his files, send one to the warden of the institution in which the prisoner is located and return two copies to the prosecutor who will give one to the agent for use in establishing his authority and place one in his files.

1979 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form VII

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION
WITH A PRISONER'S REQUEST FOR DISPOSITION OF A DETAINER

TO: _____
(Warden, Superintendent, Director) _____ (Institution) _____

(Address) _____

In response to your letter of _____ and offer of temporary custody
(Date) _____

regarding _____ who is presently
(Name of Prisoner) _____

under indictment, information, complaint in the _____ of which
(Jurisdiction) _____

I am _____, please be advised that I accept temporary custody and that
(Title of Prosecuting Officer) _____

I propose to bring this person to trial on the indictment, information or complaint named in the offer within the
time specified in Article III (a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction, I will return the prisoner di-
rectly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete
Form IX, the Notice of Disposition of a Detainer, immediately after trial.

COMMENTS: [If your jurisdiction is the only one named in the offer of temporary custody, use the space be-
low to indicate when you would like to send your agents to conduct the prisoner to your jurisdiction. If the offer
of temporary custody has been sent to other jurisdictions in your state, use the space below to make inquiry as
to the order in which you will receive custody, or to indicate any arrangements you have already made with
other jurisdictions in your state in this regard.]

Signed: _____

Title: _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of
Article IV (a) and that the facts recited in this request for temporary custody are correct and that having duly
recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the
Agreement on Detainers.

DATED: _____ Signed: _____
(Judge) _____

(Court) _____

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of a prisoner's
request for disposition of a detainer. If the offer has been received because another prosecutor in your state has initiated the re-
quest, use Form VIII. Copies of Form VII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in
the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copies should
be retained by the person filing the acceptance and the judge who signs it.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form VIII

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH ANOTHER PROSECUTOR'S REQUEST FOR DISPOSITION OF A DETAINER

TO: _____
(Warden, Superintendent, Director) (Institution)

(Address)

According to your letter of _____,
(Date) (Name of Prisoner)

_____ is being returned to this state at the request of

(Title of Prosecuting Officer) of _____
(Jurisdiction)

I hereby accept your offer of temporary custody of _____
(Name of Prisoner)

who also is under indictment, information or complaint in the _____
(Jurisdiction)

_____ of which I am the _____
(Title of Prosecuting Officer)

I plan to bring this person to trial on said indictment, information or complaint within the time specified in Article IV(c) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer immediately after trial.

COMMENTS: [Use the space below to make inquiry as to order in which your jurisdiction will receive custody or to inform the warden of arrangements you have already made with other jurisdictions in your state in this regard.]

Signed: _____

Title: _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a), and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

Dated: _____ Signed: _____
(Judge)

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of another prosecutor's request for disposition of a detainer. If the offer has been received because a prisoner has initiated the request, use Form VII to accept such an offer. Copies of Form VIII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoners incarcerated. Copy should be retained by the person filing the acceptance and the judge who signs it.

1979 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form IX
PROSECUTOR'S REPORT ON DISPOSITION OF CHARGES

TO: _____ (Date) _____
(Superintendent)

(Name of Institution in which the Prisoner was originally imprisoned)

(Street Address)

(City) _____ (State) _____ (Zip Code)

(Name of Inmate) _____ (Number)

was transferred to the State of _____ pursuant to the Interstate
(Name of State)

Agreement on Detainers for trial based on the pending charge or charges contained in the Agreement on Detainers, Form II (if transfer was at the request of inmate) or in Forms IV and V (if transfer was at request of the prosecutor).

The disposition of the pending charge or charges in this jurisdiction was as follows:

Disposition: _____

Prosecuting Officer

Jurisdiction

In quadruplicate—One copy to be retained by the prosecutor; one copy to be sent to the warden of the state of original imprisonment, one copy to be sent to the compact administrator of the state of original imprisonment, one copy to be sent to the warden or agency which will have jurisdiction over the prisoner when he returns to the state which placed the detainer to serve his new sentence.

INTERSTATE AGREEMENT ON DETAINERS

North Carolina General Statutes 148-89 To 148-95

The Interstate Agreement on Detainers was prepared by the Council of State Governments and has a three-fold purpose. This Agreement makes it possible for Detainers to be cleared, at the instance of the prisoner, in states which are parties to the Agreement. It gives the prisoner a way to test the substantiality of Detainers placed against him and to secure final judgment on any indictments, informations, or complaints outstanding against him in the member states. As a result, a prisoner has a greater degree of knowledge of his own future, and he is also able to make better plans for his treatments.

The Agreement also provides methods whereby the Prosecuting Attorney, or Solicitor, may secure prisoners incarcerated in other jurisdictions for trial before the expiration of their sentences. At the same time, a Governor's right to refuse to make a prisoner available is retained.

Under the Agreement, wardens and other custodial officials are requested to inform all prisoners of all indictments, informations, or complaints on the basis of which Detainers have been lodged against them by members of the jurisdiction. Prisoners may then request trial on such pending charges. These requests are transmitted through the warden to the proper official in the other jurisdiction who then has 180 days to bring the prisoner to trial. For this purpose, the solicitor, or prosecutor, can obtain temporary custody of the prisoner and take him to the jurisdiction in which trial is to be held. Upon completion of the trial, the prisoner is returned to the institution in which he was incarcerated. If convicted on these charges, any sentence imposed is served in the second jurisdiction following the completion of the original sentence.

If the prisoner is not brought to trial within the 180-day period, the indictment, information or complaint is dismissed with prejudice, and the Detainer is no longer valid. However, the time limit can be extended for good cause when in open court with the prisoner or with his counsel present.

Prosecutors, or solicitors, can also initiate actions to obtain trials of prisoners in other member jurisdictions against whom they have indictments, informations, or complaints pending and the detainers have been lodged. The prosecutor can make a request to the appropriate officials in the jurisdiction where the prisoner is being held. Unless the request is denied by the Governor of the State within 30 days, temporary custody is given to the prosecutor having and holding trial. Trial must be commenced within 120 days of the date the prisoner arrives in the jurisdiction seeking him unless extended for good cause. Provisions concerning service of the sentence and failure to begin trial in the allotted time period are as noted above.

When a request is made by a prisoner to clear a detainer, this constitutes a request to clear all detainers emanating from the same state and based upon indictments, informations, or complaints, so repeated trips to the same state are not necessary.

The agreement may be joined by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the U. S. Government. The word "State" as defined in the Agreement includes all of these jurisdictions. To date, thirty-nine (39) states, the District of Columbia,

and the U. S. Government have joined the Agreement. The following states have not adopted the Interstate Agreement on Detainers: Alabama, Alaska, Florida, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, Rhode Island, South Dakota, and Texas.

The Council of State Governments, in drafting the suggested legislation for the Agreement, also has drafted rules, regulations and forms to be used under the Agreement on Detainers. These forms consist of the following:

- (1) Notice of untried indictment, information or complaint and of right of request for disposition.
- (2) Inmate's notice of place of imprisonment and request for disposition of indictments, informations or complaints.
- (3) Certificate of inmate status.
- (4) Officer to deliver temporary custody.
- (5) Request for temporary custody.
- (6) Evidence of agent's authority to act for receiving state.
- (7) Prosecutor's acceptance of temporary custody offered in connection with a prisoner's request for disposition of a detainer.
- (8) Prosecutor's acceptance of temporary custody offered in connection with another prosecutor's request for disposition of a detainer.
- (9) Prosecutor's report on disposition of charges.

Each of the forms contains instructions as to the number to be prepared and the distribution.

The Council of State Governments also has distributed suggested instructions for prosecutors and suggested instructions for wardens. (See below.)

SUGGESTED INSTRUCTIONS FOR PROSECUTING OFFICIALS UNDER THE INTERSTATE AGREEMENT ON DETAINERS

When an untried indictment, information or complaint is lodged against an inmate in our custody by a member of the Interstate Agreement on Detainers, a Form #1 is completed and sent to the inmate. All indictments, informations or complaints on the basis of which there are detainers from the state involved are listed on the form.

An inmate on receipt of Form #1 may request final disposition of any untried indictment, information or complaint. He does this by filing a Form #2. Upon filing Form #2, the custodian completes Forms #3 and #4, and sends the three forms to the prosecuting officer and court clerk in the jurisdiction in which the untried indictment, information or complaint is pending. At the same time, signed carbons of these forms are sent to the prosecuting officer and court clerk in any other jurisdiction within the same state which has lodged a detainer based on untried indictments, informations or complaints pending against the inmate. These officials are informed by letter that all such indictments, informations and complaints are listed on Form #4 and must be disposed of in accordance with the provisions of Article III of the Agreement. This letter will request a prompt reply indicating the action which the jurisdiction intends to take on the indictment, information or complaint.

The inmate is notified when Form #7 is received from a prosecutor indicating that he intends to bring the inmate to trial under the provisions of the Agreement.

If within 90 days a reply is not obtained to the inmate's request for disposition or to any letters of notification, the Administrator of the Agreement in the custodial state is to be requested to seek the assistance of the Administrator of the other state involved.

If the inmate is not brought to trial within 180 days and no continuance is granted by the court of appropriate jurisdiction, all indictments, informations or complaints listed on Form #4 become invalid as far as custodial responsibility is concerned. A notation to this effect is placed on the detainer from the indictment, information or complaint and the detainer shall be disregarded in further decisions regarding the inmate's status of privileges. The detainer is not returned to the lodging jurisdiction. If uncertain as to the granting of a continuance, the prosecutor will be asked. If no reply is received, the detainer will be considered invalid. However, since there may have been a continuance granted about which the custodian has not been informed, no communication will be sent to the jurisdiction in the other state which might prevent further action on their part.

REQUESTS FROM PROSECUTORS FOR TEMPORARY CUSTODY OF AN INMATE

A prosecutor who has lodged a detainer, based on an untried indictment, information or complaint against an inmate, may initiate action to bring him to trial. This action commences with a request for temporary custody which is made through the use of Form #5.

Upon receipt of a copy of Form #5 from a prosecuting officer, the custodian sends a copy to the inmate. The Governor is notified of this request for temporary custody so that he may have an opportunity to disapprove it if he so desires. Form #3 is completed and sent to the prosecuting officer who has filed the request and to all officials in the State who have filed detainers based on untried indictments, informations or complaints. In an accompanying letter each official is notified of the request for temporary custody and they are informed that the inmate must be brought to trial in their jurisdiction in accordance with the provisions of Article IV of the Agreement. The letter will request the prosecutor to promptly complete and forward Form #8, as a request for temporary custody, if he intends to take action in the case, and to notify the custodian if he does not intend to do so.

If the Governor of the Custodian State notifies the custodian that he approves the request for temporary custody, or if he takes no action on the request within 30 days, a completed Form #4 is sent by the custodian to the prosecuting officer who made the request. Signed carbons are also sent to any other officials in the same state who have previously received copies of Form #3. A copy is given to the inmate. If the Governor disapproves the request, all officials are notified immediately.

If no replies are received after 60 days from any of the jurisdictions concerned, the Administrator of the Agreement in the custodian state is to be notified and requested to seek the assistance of the Administrator in the other state. If replies are received from any jurisdiction indicating intention to bring the inmate to trial, he is notified immediately. Failure to bring an inmate to trial when a prosecutor has initiated the action does not invalidate the indictment, information or complaint unless the inmate is taken to that state for trial in which case trial must be commenced within 120 days.

IDENTIFICATION OF AGENT TAKING CUSTODY OF INMATE

Before an agent is sent to another state to take custody of an inmate for return to North Carolina for trial, Form #6 must be completed in quadruplicate and all copies must be signed by the prosecutor and the agent. These are then sent to the Administrator in our state. After signing all copies, our Administrator will retain one copy, shall send one copy to the warden of the institution where the inmate is located and will return two copies to you. One of these will be given to the agent for use in establishing his authority and one copy is for your files.

As soon as you have completed your trial of the inmate, you should notify any other prosecutors in this state, who may have untried indictments, informations or complaints in order that they may take custody and try the inmate. All such prosecutors will be shown on your copy of the Form #4. If there are no other untried indictments, informations or complaints in our state, the inmate is returned to the sending state to complete his sentence there. The prosecutor makes a report on the disposition of the charges on Form #9.

Rule 1

Definitions

In these rules, unless the context or subject matter otherwise requires:

- (a) Commission means the Judicial Standards Commission.
- (b) Judge or respondent means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).
- (c) Court means the Supreme Court of North Carolina. Clerk means the Clerk of the Supreme Court.
- (d) Commission's attorney means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.
- (e) The masculine gender includes the feminine gender.
- (f) Service of a document required to be served means either mailing the document by U.S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N.C. Rules of Civil Procedure.

Rule 2

Petition for Hearing

- (a) Notice to Judge. When the Commission, pursuant to its Rule 10, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U.S. certified mail, return receipt requested, to the respondent named therein.
- (b) Petition for Hearing. The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate

Appendix V-A. Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission

Editor's Note. — These rules were adopted
Sept. 25, 1975.

Rule	Rule
1. Definitions	(d) Briefs
2. Petition for Hearing	(e) Oral Argument
(a) Notice to Judge	3. Decision by the Court
(b) Petition for Hearing	4. Reproduction of Record and Briefs
(c) Failure to File Petition	5. Costs

Rule 1

Definitions

In these rules, unless the context or subject matter otherwise requires:

- (a) Commission means the Judicial Standards Commission.
- (b) Judge or respondent means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).
- (c) Court means the Supreme Court of North Carolina. Clerk means the Clerk of the Supreme Court.
- (d) Commission's attorney means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.
- (e) The masculine gender includes the feminine gender.
- (f) Service of a document required to be served means either mailing the document by U.S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N.C. Rules of Civil Procedure.

Rule 2

Petition for Hearing

- (a) **Notice to Judge.** When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U.S. certified mail, return receipt requested, to the respondent named therein.
- (b) **Petition for Hearing.** The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate

showing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and, upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) **Failure to File Petition.** If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the recommendation on the record filed by the Commission. Failure to file a petition waives the right to file a brief and to be heard on oral argument.

(d) **Briefs.** Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) **Oral Argument.** After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has not filed a brief will not be heard upon oral argument.

Rule 3

Decision by the Court

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk and published in the Advance Sheets and bound volumes of the Supreme Court Reports.

Editor's Note. — The amendment adopted April 14, 1976, substituted "and published in the Advance Sheets and bound volumes of the

Supreme Court Reports" for "as a part of the record of the proceeding" in the last sentence.

Rule 4

Reproduction of Record and Briefs

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

Appendix VI. Rules, Regulations and Organizations of The North

Rule 5 Costs

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

Standing Committees of the Council

Article IX.

Discipline and Disbarment of Attorneys

Determination of Denial:

1. General Provisions
2. Proceedings for Discipline
3. Definitions
4. State Bar Council — Powers and Duties in Discipline and Denial Matters
5. Chairman of the Grievance Committee — Powers and Duties
6. Grievance Committee — Powers and Duties
7. Council — Powers and Duties
8. Chairman of the Hearing Committee — Powers and Duties
9. Hearing Committee — Powers and Duties
10. Secretary — Powers and Duties in Discipline and Denial Matters
11. Grievances — Form and Filing
12. Investigation: Initial Determination
13. Preliminary Hearing

14. Burden of Proof
15. Denial of License, Withdrawal, Resignation
16. Denial of License
17. Suspension of License
18. Denial of License
19. Denial of License
20. Denial of License
21. Denial of License
22. Denial of License
23. Denial of License
24. Denial of License
25. Denial of License
26. Denial of License
27. Denial of License
28. Denial of License
29. Denial of License

Article VI.

Meetings of the Council

§ 3. Standing Committees of the Council —

a. Committee on Grievances —

Grievance Committee of not less than fifteen members, one of whom shall be designated as Chairman and one as Vice-Chairman. The Committee shall have as members at least three councilors from each of the court divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct.

b. Committee on Unauthorized Practice of not less than three Councilors selected by the President.

§ 1. General Provisions.

The purpose for establishing a committee on the unauthorized practice of law and the reasons for the prohibition against the practice of law by those who have not been examined, found qualified to practice law and licensed to practice law is to protect the public from being misled and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any,

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23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.
24. Notice to Clients of Disbarred or Suspended Attorneys.
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ARTICLE VI.

Meetings of the Council.

§ 5. Standing Committees of the Council. —

c. Committee on Grievances. —

Grievance Committee of not less than fifteen members, one of whom shall be designated as Chairman and one as Vice-Chairman. The Committee shall have as members at least three councillors from districts in each of the court divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct.

e. Committee on Unauthorized Practice of not less than three Councillors selected by the President.

§ 1. General Provisions.

The purpose for establishing a committee on the unauthorized practice of law and the reasons for the prohibition against the practice of law by those who have not been examined, found qualified to practice law and licensed to practice law is to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any,

control in the matter of infractions of the Code of Professional Responsibility which in the public interest, lawyers are bound to observe.

§ 2. Proceeding for Prohibition of Unauthorized Practice of Law.

The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings into unauthorized practice of law matters, but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) Appellate Division: The Appellate Division of the General Court of Justice.

(2) Chairman of the Unauthorized Practice of Law Committee: councillor appointed to serve as chairman of the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(3) Complainant or Complaining Witness: any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) Complaint: a formal pleading filed in the name of The North Carolina State Bar in the Superior Court against a person, firm or corporation after a finding of probable cause.

(5) Council: The Council of The North Carolina State Bar.

(6) Councillor: a member of The Council of The North Carolina State Bar.

(7) Counsel: the Counsel of The North Carolina State Bar appointed by the Council.

(8) Court or Courts of this State: a court authorized and established by the Constitution or laws of the State of North Carolina.

(9) Defendant: any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) Unauthorized Practice of Law Committee: the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(11) Investigation: the gathering of information with respect to alleged unauthorized practice of law.

(12) Investigator: any person designated to assist in investigation of alleged unauthorized practice of law.

(13) Letter of Caution: communication from the Unauthorized Practice of Law Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(14) Letter of Notice: a communication to an accused individual or corporation setting forth the substance of the alleged conduct involving unauthorized practice of law.

(15) Office of the Counsel: the office and staff maintained by the Counsel of The North Carolina State Bar.

(16) Office of the Secretary: the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(17) Party: after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(18) Plaintiff: after a complaint has been filed, The North Carolina State Bar.

(19) Preliminary Hearing: hearing by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(20) Probable Cause: a finding by the Unauthorized Practice of Law Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(21) Secretary: the Secretary-Treasurer of The North Carolina State Bar.

(22) Supreme Court: the Supreme Court of North Carolina.

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise the administration of Unauthorized Practice of Law Committee in accordance with the provisions hereinafter set forth.

(2) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

§ 5. Chairman of the Unauthorized Practice of Law Committee — Powers and Duties.

(A) The Chairman of the Unauthorized Practice of Law Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Unauthorized Practice of Law Committee that an investigation be initiated.

(3) To recommend to the Unauthorized Practice of Law Committee that a complaint be dismissed.

(4) To direct a Letter of Notice to accused person or corporation.

(5) To notify an accused and any complainant that a complaint has been dismissed.

(6) To call meetings of the Unauthorized Practice of Law Committee for the purpose of holding preliminary hearings.

(7) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(8) To administer oaths or affirmations to witnesses.

(9) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Unauthorized Practice of Law Committee shall perform the functions of the Chairman of the Unauthorized Practice of Law Committee in any matter when the Chairman is absent or disqualified.

§ 6. Unauthorized Practice of Law Committee — Powers and Duties.

The Unauthorized Practice of Law Committee shall have the power and duty:

(1) To direct the Counsel to investigate any alleged unauthorized practice of law by any person, firm or corporation in the State of North Carolina.

(2) To hold preliminary hearings, find probable cause and direct the complaints be filed.

(3) To dismiss complaints upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused in cases wherein unauthorized practice of law is not established but the activities of the accused are deemed to be improper or may become the basis for unauthorized practice of law if continued or repeated.

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise.

(2) To recommend to the Chairman of the Unauthorized Practice of Law Committee that a matter be dismissed because the complaint is frivolous or falls outside the Council's jurisdiction; that a Letter of Notice be issued; or that the matter be passed upon by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(3) To prosecute all unauthorized practice of law proceedings before the Unauthorized Practice of Law Committee and the courts.

(4) To represent The North Carolina State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by the Unauthorized Practice of Law Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding.

(6) To employ assistant counsel, investigators, and other administrative personnel in such numbers as the Council may from time to time authorize.

(7) To maintain permanent records of all matters processed and the disposition of such matters.

(8) To perform such other duties as the Council may from time to time direct.

§ 8. Secretary — Powers and Duties in Unauthorized Practice of Law Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) To receive complaints for transmittal to the Counsel.

(2) To issue summons and subpoenas when so directed by the President or the Chairman of the Unauthorized Practice of Law Committee.

(3) To maintain a record and file of all complaints not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Unauthorized Practice of Law Committee.

§ 9. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Unauthorized Practice of Law Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the complaint as may be appropriate and submit to the Chairman of the Unauthorized Practice of Law Committee a report detailing the findings of the investigation.

(2) The Chairman of the Unauthorized Practice of Law Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused in writing or otherwise; or (3) send a Letter of Notice to the accused party.

(3) If a Letter of Notice is sent to the accused individual or corporation, it shall be by registered mail and shall direct that a response be made within fifteen (15) days of receipt of the Letter of Notice.

(4) If a timely response to a Letter of Notice is made, the Chairman shall direct the Counsel to conduct further investigation or to terminate the investigation and place the item on the agenda for the next forthcoming Unauthorized Practice of Law Committee meeting.

(5) If, after the expiration of fifteen (15) days from the date of the receipt of the Letter of Notice, the individual or corporation has failed or refused to respond or has given a response that is insufficient to resolve the matter, the Chairman may direct Counsel to proceed to seek injunctive relief to enjoin such unauthorized practice pursuant to G.S. 84-37 or direct Counsel to notify the District Attorney of the Judicial District wherein the accused individual or corporation resides to bring injunctive or criminal proceedings against that individual or corporation pursuant to G.S. 84-7 et seq.

§ 10. Preliminary Hearing.

At the regular quarterly meeting of the Unauthorized Practice of Law Committee, the Committee shall consider all matters presented to it by Counsel and shall determine whether or not probable cause exists in each matter tending to establish that a person, firm or corporation is engaged in the unauthorized practice of law in North Carolina.

If no probable cause is found, the Committee shall recommend to the Council that the matter be dismissed. If probable cause is found the Committee shall then recommend to the Council that the matter be prosecuted in the General Court of Justice as by law provided.

Editor's Note. — The amendments approved by the Supreme Court Nov. 4, 1975 and Feb. 3, 1976, rewrote paragraph c of § 5.

The amendment approved by the Supreme

Court Feb. 24, 1978, rewrote paragraph e of § 5.

As the rest of this article was not changed by the amendments, only paragraphs c and e of § 5 are set out.

ARTICLE IX.*Discipline and Disbarment of Attorneys.***Determination of Disability.****§ 1. General Provisions.**

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, when done at other times or that it has not been made the subject of disciplinary proceedings earlier, shall not be an excuse for any member of the Bar.

§ 2. Proceeding for Discipline.

The procedure to discipline members of the Bar of this State shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings to discipline members of the Bar but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of the members of The North Carolina State Bar.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) **Accused or Accused Attorney:** a member of The North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(2) **Appellate Division:** The Appellate Division of the General Court of Justice.

(3) **Certificate of Conviction:** the certified copy of any judgment wherein a member of The North Carolina State Bar is convicted of a criminal offense, forwarded to the Secretary-Treasurer by the clerk of any state or federal court.

(4) **Chairman of the Grievance Committee:** councilor appointed to serve as chairman of the Grievance Committee of The North Carolina State Bar.

(5) **Commission:** The Disciplinary Hearing Commission of The North Carolina State Bar.

(6) **Commission Chairman:** the Chairman of the Hearing Commission of The North Carolina State Bar.

(7) **Complainant or Complaining Witness:** any person who has complained of the conduct of any member of The North Carolina State Bar to any officer or agency of The North Carolina State Bar.

(8) **Complaint:** a formal pleading filed in the name of The North Carolina State Bar with the Commission Chairman against a member of The North Carolina State Bar after a finding of probable cause.

(9) **Council:** the Council of The North Carolina State Bar.

(10) **Councilor:** a member of The Council of The North Carolina State Bar.

(11) **Counsel:** the Counsel of The North Carolina State Bar appointed by the Council.

(12) **Court or Courts of This State:** a court authorized and established by the Constitution or laws of the State of North Carolina.

(13) **Defendant:** a member of The North Carolina State Bar against whom a complaint is filed after a finding of probable cause.

(14) **Disabled or Disability:** condition of mental or physical incapacity interfering with the professional judgment or competence of an attorney; habitual intemperance; or the wilful and persistent failure to perform professional duties.

(15) **Grievance:** alleged misconduct.

(16) **Grievance Committee:** the Grievance Committee of The North Carolina State Bar.

(17) **Hearing Committee:** a hearing committee designated under § 14(4).

(18) **Incapacity or Incapacitated:** condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(19) **Investigation:** the gathering of information with respect to alleged misconduct or disability or to reinstatement.

(20) **Investigator:** any person designated to assist in investigation of alleged misconduct or of reinstatement.

(21) **Letter of Caution:** communication from the Grievance Committee to an attorney stating that past conduct of the attorney, while not the basis for discipline, is not professionally acceptable or may be the basis for discipline if continued or repeated.

(22) **Letter of Notice:** a communication to an accused attorney setting forth the substance of a grievance.

(23) **Office of the Counsel:** the office and staff maintained by the Counsel of The North Carolina State Bar.

(24) **Office of the Secretary:** the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(25) **Party:** after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused attorney as defendant.

(26) **Plaintiff:** after a complaint has been filed, The North Carolina State Bar.

(27) **Preliminary Hearing:** hearing by the Grievance Committee to determine whether probable cause exists.

(28) **Probable Cause:** a finding by the Grievance Committee that there is reasonable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(29) **Secretary:** the Secretary-Treasurer of The North Carolina State Bar.

(30) **Serious Crime:** the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of, any felony, or any crime that involves bribery, embezzlement, false pretenses and cheats, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury or wilful failure to file a tax return.

(31) **Supreme Court:** the Supreme Court of North Carolina.

(32) **Consolidation of Cases:** a hearing by a Hearing Committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise and conduct discipline and incapacity or disability proceedings in accordance with the provisions hereinafter set forth.

(2) To appoint members of the Disciplinary Hearing Commission as provided by statute.

(3) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

(4) To order the transfer of a member to inactive status when such member has been judicially declared incompetent or has been committed to institutional care voluntarily or involuntarily because of incompetence or disability.

(5) To accept the surrender of the license to practice law of any member of The North Carolina State Bar during the progress of disciplinary proceedings against the member and impose such conditions upon the acceptance as the Council deems appropriate.

(6) To review the report of any Hearing Committee upon a petition for reinstatement and make the final determination as to whether the license shall be restored.

§ 5. Chairman of the Grievance Committee — Powers and Duties.

(A) The Chairman of the Grievance Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Grievance Committee that an investigation be initiated.

(3) To recommend to the Grievance Committee that a grievance be dismissed.

(4) To direct a Letter of Notice to an accused attorney.

(5) To issue, at the direction and in the name of the Grievance Committee, Letters of Caution or private reprimands to an accused attorney.

(6) To notify an accused attorney that a grievance has been dismissed, and to notify the complainant in accordance with § 21.

(7) To call meetings of the Grievance Committee for the purpose of holding preliminary hearings.

(8) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(9) To administer oaths or affirmations to witnesses.

(10) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Grievance Committee shall perform the functions of the Chairman of the Grievance Committee in any matter when the Chairman is absent or disqualified.

§ 6. Grievance Committee — Powers and duties:

The Grievance Committee shall have the power and duty:

(1) To direct the Council to investigate any alleged misconduct or disability of a member of The North Carolina State Bar coming to its attention.

(2) To hold preliminary hearings, find probable cause and direct that complaints be filed.

(3) To dismiss grievances upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused attorney in cases wherein misconduct is not established but the activities of the accused attorney are deemed to be improper or may become the basis for discipline if continued or repeated.

(5) To issue a private reprimand to an accused attorney in cases wherein minor misconduct is established.

(6) To direct that petitions be filed seeking a determination whether a member of The North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged misconduct whether initiated by the filing of grievance or otherwise.

(2) To recommend to the Chairman of the Grievance Committee that a matter be dismissed because the grievance is frivolous or falls outside the Council's jurisdiction; that a Letter of Caution or private reprimand be issued; or that the matter be passed upon the Grievance Committee to determine whether probable cause exists.

(3) To prosecute all disciplinary proceedings before the Grievance Committee, Hearing Committees and the courts.

(4) To represent The North Carolina State Bar in any trial, hearing or other proceeding concerned with the alleged disability of a member due to mental infirmity, illness, or addiction to drugs or intoxicants.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by Grievance Committee, Hearing Committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding.

(6) To appear at hearings conducted with respect to petitions for reinstatement or restoration of license by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of the petition and to present evidence, if any, in opposition to the petition.

(7) To employ assistant counsel, investigators and other administrative personnel in such numbers as the Council may from time to time authorize.

(8) To maintain permanent records of all matters processed and the disposition of such matters.

(9) To perform such other duties as the Council may from time to time direct.

§ 8. Chairman of the Hearing Commission — Powers and Duties.

(A) The Chairman of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the power and duty:

(1) To receive complaints alleging misconduct and petitions alleging the disability of a member filed by the Grievance Committee and petitions requesting reinstatement or restoration of license by members of The North Carolina State Bar who have been involuntarily transferred to inactive status, suspended or disbarred.

(2) To assign three members of the Commission, consisting of two members of The North Carolina State Bar and one layman, to hear such complaint or petition. The chairman shall designate one of the attorney members as chairman of the Hearing Committee. Provided: that no member shall be appointed to serve on any committee reviewing a petition for reinstatement in a case wherein that member served on the Hearing Committee that originally ordered the discipline or transfer to inactive status. The Chairman of the Hearing Commission may designate himself to serve as one of the attorney members of any Hearing Committee and shall be chairman of any Hearing Committee on which he serves.

(3) To set the time and place for the hearing on each complaint or petition.

(4) To subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) To file findings, conclusions and orders of the Hearing Committees with the Secretary.

(6) In his discretion to consolidate for hearing two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint.

(7) To prepare and issue letters of private reprimand.

(B) The Vice-Chairman of the Disciplinary Hearing Commission shall perform the function of the Chairman in any matter when the Chairman is absent or disqualified.

§ 9. Hearing Committee — Powers and Duties.

Hearing Committees of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the following powers and duties:

(1) To hold hearings on complaints alleging misconduct and petitions seeking a determination of disability or reinstatement.

(2) To enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the Committee shall designate.

(3) To subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Subpoenas shall be issued by the chairman of the Hearing Committee in the name of the Disciplinary Hearing Commission of The North Carolina State Bar. The chairman may direct the Secretary to issue such subpoenas.

(4) To administer oaths or affirmations to witnesses at hearings.

(5) To make findings of fact and conclusions of law.

(6) To enter orders dismissing complaints in matters before the Committee.

(7) To enter orders of discipline against attorneys in matters before the Committee.

(8) To tax costs of the disciplinary procedures against any defendant against whom discipline is imposed: Provided, however, that such costs shall not include the compensation of any member of the Council, committees or agencies of The North Carolina State Bar.

(9) To enter orders transferring a member to inactive status on the ground of incapacity or disability to continue the practice of law.

(10) To report to the Council its findings of fact and recommendations after hearings on petitions for reinstatement or restoration of license by members previously transferred to inactive status by a Hearing Committee or the Council, suspended, or disbarred.

§ 10. Secretary — Powers and Duties in Discipline and Disability Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

- (1) To receive complaints for transmittal to the Counsel.
- (2) To issue summons and subpoenas when so directed by the President, the Chairman of the Grievance Committee, the Chairman of the Disciplinary Hearing Commission, or the Chairman of any Hearing Committee.
- (3) To maintain a record and file of all grievances not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Grievance Committee.

§ 11. Grievances — Form and Filing.

(a) A grievance may be filed by any person against a member of The North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the Counsel. The Counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms shall be available in the Office of the Counsel, the Office of the Secretary, and the offices of the several clerks of court in this State. Grievances reduced to writing on such standard form shall be transmitted by the complainant to the Office of the Secretary.

(2) Upon the direction of the Council or the Grievance Committee the Counsel shall undertake the investigation of such conduct of any member of The North Carolina State Bar as may be specified by the Council or Grievance Committee.

(3) The Counsel may undertake an investigation of any matter coming to the attention of the Counsel involving alleged misconduct of a member of the North Carolina State Bar: Provided that such investigation has been authorized by the Chairman of the Grievance Committee.

§ 12. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Grievance Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the grievance as may be appropriate and submit to the Chairman of the Grievance Committee a report detailing the findings of the investigation.

(2) Within fifteen days of the receipt of the initial or any interim report of the Counsel concerning any grievance, the Chairman of the Grievance Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused attorney in writing or otherwise; or (3) send a Letter of Notice to the accused attorney.

(3) If a Letter of Notice is sent to the accused attorney, it shall be by registered mail and shall direct that a response be made within fifteen days of receipt of the Letter of Notice. Such response shall be in a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.

(4) If a timely response to a Letter of Notice is made, the Chairman of the Grievance Committee shall direct the Counsel to conduct further investigation or shall terminate the investigation and so inform the Counsel.

(5) If, after the expiration of fifteen days from the date of receipt of a Letter of Notice, the accused attorney has failed or refused to respond or has given a response that is insufficient to resolve the grievance, the Chairman of the Grievance Committee may examine witnesses, including the accused, under oath and issue subpoenas to compel their attendance, and compel the production of books, papers, and other documents or writings deemed necessary or material

to the inquiry. Each subpoena shall be issued by the Chairman of the Grievance Committee, or by the Secretary at the direction of the Chairman. The Counsel may examine such witnesses under oath or otherwise.

(6) Within forty-five days of the receipt of the final report of the Counsel, or the termination of an investigation, the Chairman shall convene the Grievance Committee for a preliminary hearing or seek approval of the Committee of the dismissal of the grievance.

(7) Neither the unwillingness nor neglect of the complainant to sign a grievance, nor settlement, compromise or restitution shall, in itself, justify abatement of an investigation into the conduct of an attorney.

§ 13. Preliminary Hearing.

(1) The Grievance Committee shall determine whether there is probable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(2) The Chairman of the Grievance Committee shall have the power to administer oaths and affirmations.

(3) The Chairman shall keep a record of the number of members concurring in the finding of every grievance and shall file the record with the Secretary, but the record shall not be made public except on order of the Council.

(4) The Chairman shall have the power to subpoena witnesses and compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) The Counsel, and assistant counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the Committee is in session, and deliberating, but no persons other than members may be present while the Committee is voting.

(6) Disclosure of matters occurring before the Committee other than its deliberations and the vote of any member may be made to the Counsel or the Secretary for use in the performance of their duties. Otherwise a member, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the Committee only when so directed by a court of record preliminarily to or in connection with a judicial proceeding.

(7) At any preliminary hearing held by the Grievance Committee, a quorum of two thirds of the members shall be required to conduct any business. Affirmative vote of a majority of members present shall be necessary for a finding that probable cause exists. The Chairman shall not be counted for quorum purposes and shall be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(8) If probable cause is found, the Chairman shall direct the Counsel to prepare and file a complaint against the accused attorney. If no probable cause is found the grievance shall be dismissed.

(9) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is not in accord with accepted professional practice, or may be the subject of discipline if continued or repeated, the Committee may issue a Letter of Caution to the accused attorney. A record of such Letter of Caution shall be maintained in the Office of the Secretary.

(10) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a private reprimand to the accused attorney. A record of such private reprimand shall be maintained in the Office of the Secretary, and a copy of the

private reprimand shall be served upon the accused attorney as provided in G.S. 1A-1, Rule 4. Within fifteen days after service the accused attorney may refuse the private reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.

(11) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.

§ 14. Formal Hearing.

(1) Complaints shall be filed in the Office of the Secretary. The Secretary shall cause a summons and a copy of the complaint to be served upon the defendant attorney and thereafter a copy of the complaint shall be delivered to the Chairman of the Disciplinary Hearing Commission, informing the Chairman of the date service on the defendant was effected.

(2) Service of complaints and other documents or papers shall be accomplished as set forth in G.S. 1A-1, Rule 4.

(3) Complaints in disciplinary actions shall set forth the charges with sufficient precision to clearly apprise the defendant attorney of the conduct which is the subject of the complaint.

(4) Within seven days of return of service of a complaint, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for the hearing to commence. The commencement of the hearing shall be scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the defendant.

(5) Within twenty days after the service of the complaint, unless further time is allowed by the Chairman upon good cause shown, the defendant shall file an answer to the complaint with the Secretary and shall deliver a copy to the Counsel.

(6) Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, shall be grounds for entry of the defendant's default and in such case the allegations contained in the complaint shall be deemed to be admitted. The Hearing Committee shall thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate.

(7) Discovery shall be available to the parties in accordance with the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rules 26-37. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended, for good cause shown, by the Chairman. The Chairman may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(8) In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the parties for such purposes may be held at any time prior to or during hearings as time, the nature of the proceeding, and the public interest may permit. Any settlement or compromise of any issue in the case shall be subject to the approval of the Hearing Committee.

(9) At the discretion of the Chairman of the Hearing Committee a conference may be ordered prior to the date set for commencement of the hearing, and upon five days' notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the Committee designated by its Chairman. At any prehearing or other conferences which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

- (a) The simplification of the issues.
- (b) The exchange and acceptance of service of exhibits proposed to be offered in evidence.
- (c) The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.
- (d) The limitation of the number of witnesses.
- (e) The discovery of production of data.
- (f) Such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(9.1) The Chairman of the Hearing Committee may hear and dispose of all pretrial motions excepting only motions the granting of which would result in continuance or dismissal of the charges or final judgment for either party.

(10) The initial hearing date as set by the Chairman in accordance with subsection (4) of this section may be reset by the Chairman pursuant to subsections (5) and (7) of this section, and said initial hearing or reset hearing may be continued by the Hearing Committee for a period not to exceed thirty days, for good cause shown.

(11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced, except for reasons that would work an extreme hardship in the absence of a continuance; provided further the Chairman of the Disciplinary Hearing Commission may continue a hearing on his own motion, or by motion of either party, in order to await the filing of a controlling decision of an appellate court.

(12) The defendant shall appear in person before the Hearing Committee at the time and place named by the Chairman. The hearing shall be open except that for good cause shown the Chairman of the Hearing Committee may exclude from the hearing room all person except the parties, Counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of the defendant. The defendant shall, except as otherwise provided by law, be competent and compellable to give evidence in behalf of either of the parties. The defendant may be represented by Counsel, who shall enter an appearance. Pleadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder.

(13) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing at the Office of the Secretary within the time limits, if any, for such filing. The date of receipt by the Office of the Secretary and not the date of deposit in the mails is determinative.

(14) When a defendant appears in his own behalf in a hearing he shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, an address at which any notice or other written communication required to be served upon him may be sent, if such address differs from that last reported to the Secretary by the defendant.

(15) When a defendant is represented by Counsel in a hearing, Counsel shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, a written notice of such appearance which shall state his name, address and telephone number, the name and address of the defendant on whose behalf he appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the Counsel of record for such defendant at the stated address of the Counsel in lieu of transmission to the defendant.

(16) The Hearing Committee shall have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Such process shall be issued in the name of the Committee by its Chairman, or the Chairman may designate the Secretary of The North Carolina State Bar to issue such process. The defendant shall have the right to invoke the powers of the Committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(17) In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the Superior Court of the State at the time of the hearing. The Chairman of the Hearing Committee shall rule on the admissibility of evidence, subject to the right of any member of the Hearing Committee to question his ruling and, in the event of such question, the entire Hearing Committee shall then rule on the matter of evidence in question.

(18) If the Hearing Committee finds that the charges of misconduct are not established by the greater weight of the evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of misconduct are established by the greater weight of the evidence, the Hearing Committee shall enter an order for discipline. In either instance the Committee shall file a separate order which shall include the Committee's findings of fact and conclusions of law and which shall be accompanied by a certified transcript of the testimony, all pleadings, exhibits and briefs.

(19) If the charges of misconduct are established, the Hearing Committee shall then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall accompany the transcript of the hearing.

(20) All reports and orders shall be signed by the members of the Hearing Committee and shall be filed with the Secretary. Copies of all reports and orders shall be delivered to the parties. The copy to the defendant shall be served as provided in G.S. 1A-1, Rule 4.

(21) In all hearings conducted pursuant to this section, a complete record shall be made of evidence received during the course of the hearing. Such transcript shall be made in the form and by means authorized for civil trials in the courts of this State.

§ 15. Effect of a Finding of Guilt in Any Criminal Case.

(1) Any member of The North Carolina State Bar convicted of a serious crime in any state or federal court, whether such a conviction results from a plea of guilty or nolo contendere or from a verdict after trial, shall, upon the conviction becoming final by affirmation on appeal or expiration of the time within which to perfect an appeal, an appeal not having been perfected, be suspended from the practice of law pending the disposition of any disciplinary proceeding in progress or commenced upon such conviction.

(2) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(3) Upon the receipt of a certificate of conviction of a member of a serious crime, the Grievance Committee will immediately authorize the filing of a complaint if one is not then pending. In the hearing on such complaint the sole issue to be determined will be the extent of the final discipline to be imposed: Provided, that no hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

(4) Upon the receipt of certificate of conviction of a member for a crime not constituting a serious crime, the Grievance Committee will commence whatever action, including the filing of a complaint, it may deem appropriate.

§ 16. Reciprocal Discipline.

(1) Upon receipt of a certified copy of an order demonstrating that a member of The North Carolina State Bar has been disciplined in another jurisdiction, the Grievance Committee shall forthwith issue a notice directed to the accused attorney containing a copy of the order from the other jurisdiction, and an order directing that the accused attorney inform the Committee within 30 days from service of the notice, of any claim by the accused attorney that the imposition of the identical discipline in this State would be unwarranted, and the reasons therefor. This notice is to be served on the accused attorney in accordance with the provisions of G.S. 1A-1, Rule 4.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (1) above, the Grievance Committee shall impose the identical discipline unless the accused attorney demonstrates:

(a) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not consistently with its duty accept as final the conclusion on that subject; or

(c) That the imposition of the same discipline would result in grave injustice; or

(d) That the misconduct established has been held to warrant substantially different discipline in this State.

Where the Grievance Committee determines that any of said elements exist, the Committee shall dismiss the case or direct that a complaint be filed.

(4) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish the misconduct for purposes of a disciplinary proceeding in this State.

§ 17. Surrender of License While Proceeding Pending.

(1) A member who is the subject of an investigation into allegations of misconduct on his part may tender his license to practice, but only by delivering to the Council an affidavit stating that he desires to resign and that:

(a) The resignation is freely and voluntarily rendered; is not the result of coercion or duress; and the member is fully aware of the implications of submitting the resignation;

(b) The member is aware that there is presently pending investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which shall specifically be set forth;

(c) The member acknowledges that the material facts upon which the complaint is predicated are true; and

(d) The resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation the member could not successfully defend against them.

(2) The Council may impose any conditions upon the acceptance of such resignation that it deems appropriate.

(3) Upon acceptance of the required affidavit, the Council shall enter an order suspending or disbaring the member on consent.

(4) The order suspending or disbaring the member on consent shall be a matter of public record. However, the affidavit required under (1) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of a court or the Council.

§ 18. Disability Hearings.

(1) Where a member of The North Carolina State Bar has been judicially declared incompetent or otherwise incapacitated or has been committed voluntarily or involuntarily to a hospital for the mentally disordered under the provisions of Chapter 122 of the General Statutes or similar laws of any jurisdiction, the Council, upon proper proof of the fact, shall enter an order transferring such member to inactive status effective immediately and for an indefinite period until the further order of the Council. A copy of such order shall be served upon such member, his guardian, or the director of the institution to which the member has been committed.

(2) When evidence has been obtained that a member of The North Carolina State Bar has become disabled, the Grievance Committee shall conduct a hearing in a manner that shall conform as nearly as is possible to the procedures set forth in § 13 of this Article. The Grievance Committee shall determine whether a petition alleging disability will be filed in the name of The North Carolina State Bar by the Chairman of the Grievance Committee.

(3) Whenever the Grievance Committee files a petition alleging the disability of a member, the Chairman of the Hearing Commission shall appoint a Hearing Committee as provided in §§ 8(a) (2) and 14 (4) to determine whether such member is disabled. The Hearing Committee shall conduct a hearing on the petition and receive whatever evidence it deems necessary or proper, including the examination of the member by such qualified medical experts as the Hearing Committee shall designate. If, upon due consideration of the matter, the Hearing Committee concludes that the member is disabled, it shall enter an order transferring the member to inactive status on the ground of such disability for an indefinite period and until the further order of the Council. Any hearing in a pending disciplinary proceeding against the member shall be held in abeyance. The Hearing Committee shall provide for such notice to the member of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the member if he or she is without adequate representation.

(4) In any proceeding seeking a transfer to inactive status under this section, the burden of proof shall be on the petitioner.

(5) If, during the course of a disciplinary proceeding, the defendant contends that he is suffering from a disability which makes it impossible for him to defend adequately, the proceeding shall be held in abeyance pending a determination by the Hearing Committee whether such disability exists. If the Hearing Committee concludes that such disability does exist, the disciplinary proceeding shall be held in abeyance until the Hearing Committee shall determine that such disability has been removed. If the Hearing Committee shall determine that the disability contended by the defendant is also one defined in § 3 (12), it shall

proceed under the provisions of (3) above as if a petition alleging such disability had been filed by the Grievance Committee. If as a result of such proceeding, the defendant is transferred to inactive status, the disciplinary proceeding shall be held in abeyance as long as the defendant remains in inactive status. If thereafter the defendant is returned to active status by the Council and a Hearing Committee determines that he is able to defend adequately, it may resume the disciplinary proceeding.

§ 19. Enforcement of Powers.

In proceedings before any committee, if any person refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey an order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing the Counsel or Secretary may apply to the appropriate court for an order directing that person to take the requisite action.

§ 20. Notice to Accused of Action and Dismissal.

In every disciplinary case wherein the accused attorney has received a Letter of Notice, and the grievance has been dismissed, the accused attorney shall be notified of the dismissal by letter by the Chairman of the Grievance Committee. The Chairman shall have discretion to give similar notice to the accused attorney in cases wherein a Letter of Notice has not been issued but the Chairman deems such notice to be appropriate.

§ 21. Notice to Complainant.

(1) If the Grievance Committee finds probable cause, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and has been referred to the Disciplinary Hearing Commission for hearing.

(2) If final action on a grievance is taken by the Grievance Committee in the form of a Letter of Caution, or a private reprimand, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and that final action has been taken thereon but that the result is confidential and may be disclosed only upon the order of a court. If final action on a grievance is a dismissal, complainant and accused attorney shall be so notified.

§ 22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or Is Transferred to Inactive Status Because of Disability.

(1) Whenever a member of The North Carolina State Bar has been transferred to inactive status because of incapacity or disability, or disappears, or dies, and no partner, personal representative or other party capable of conducting the attorney's affairs is known to exist, the Senior Resident Judge of the superior court in the district wherein is located the last address on the register of members, if it is in this State, shall be requested by the Secretary to appoint an attorney or attorneys to inventory the files of the inactive, disappeared or deceased member and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased member and his or her clients.

(2) Any member so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court

which appointed the attorney to make such inventory, or to assume the representation of any such client.

§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions shall be taken.

(1) *Reprimand.* A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission, depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary, and shall be considered confidential.

(2) *Public Censure, Suspension or Disbarment.* The Chairman of the Disciplinary Hearing Commission shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

(B) Upon the final determination of incapacity or disability the President of the Council or the Chairman of the Disciplinary Hearing Commission, depending upon the agency entering the order, shall file with the Secretary a copy of the order transferring the member to inactive status. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disabled member and also upon the minutes of the Supreme Court of North Carolina.

§ 24. Notice to Clients of Disbarred or Suspended Attorneys.

(1) A disbarred or suspended member of The North Carolina State Bar shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the disbarment or suspension and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and shall advise such clients to seek legal advice elsewhere.

(2) A disbarred or suspended member shall promptly notify, or cause to be notified by registered or certified mail, return receipt requested, each client who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension. The notice to be given to the client shall recommend the prompt substitution of another attorney or attorneys in the case.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended member to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(3) Orders imposing suspension or disbarment shall be effective thirty days after being served upon the defendant. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new

retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date the member may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with the Secretary an affidavit showing that he or she has fully complied with the provisions of the order and with the provisions of this section, and all other state, federal and administrative jurisdictions to which he or she is admitted to practice. Such affidavit shall also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(5) The disbarred or suspended member shall keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement.

§ 25. Reinstatement.

(A) After suspension or disbarment:

(1) No member of The North Carolina State Bar suspended or disbarred may resume practice until reinstated by order of the Council.

(2) A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least three years from the effective date of the disbarment.

(3) Petitions for reinstatement by disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in § 8 (A) (2), schedule a time and place for the hearing, and notify the Council and the petitioner of the composition of the Hearing Committee and the time and place for the hearing. The petitioner shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this State and that the resumption of the practice of law within the State by the petitioner will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(4) Petitions for reinstatement by suspended attorneys shall be filed with the Secretary. Upon receipt of the petition, the Secretary shall refer the petition to the Council. The Council shall make such inquiry into the matter as it deems necessary. The Council may refer the petition to the Disciplinary Hearing Commission for hearing as set forth in subsection (3) of this section.

(5) In all proceedings upon a petition for reinstatement, cross-examination of the petitioner's witnesses and the submission of evidence, if any, in opposition to the petition shall be conducted by the Council.

(6) The Council in its discretion may direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(B) After transfer to inactive status because of disability:

(1) No member of The North Carolina State Bar transferred to inactive status because of incapacity or disability may resume active status until reinstated by order of the Council. Any member transferred to inactive status because of

incapacity or disability shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as is stated in the order transferring the member to inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to inactive status because of disability shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall appoint a Hearing Committee as provided in §§ 8 (A) (2) and 14 (4). The Hearing Committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the disability has been removed and the petitioner is fit to resume the practice of law. Upon such petition the Hearing Committee may take or direct such action as it deems necessary or proper to a determination of whether the disability has been removed, including a direction for an examination of the petitioner by such qualified medical experts as the Hearing Committee shall designate. In its discretion, the Hearing Committee may direct that the expense of such an examination shall be paid by the petitioner. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record, to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(3) Where a member has been transferred to inactive status by an order of the Council based on incapacity as defined in § 3 (17) or after commitment on the grounds of incompetency and thereafter, in proceedings duly taken, the member has been judicially declared to be competent or the incapacity has been removed, the Council may dispense with further evidence that the incapacity has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(4) The filing of a petition for reinstatement to active status by a member of The North Carolina State Bar transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the disability. The petitioner shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated since transfer to inactive status and shall furnish to the Secretary written consent to each to divulge such information and records as requested by the Counsel or a Hearing Committee.

§ 26. Address of Record.

Except where otherwise specified, any provision herein for notice to an accused attorney or a defendant shall be deemed satisfied by appropriate correspondence addressed to that attorney by registered mail at the last address entered in the register of members provided for in Article II, § 1 of these rules.

§ 27. Disqualification Due to Interest.

No member of the Council or Hearing Commission shall participate in any disciplinary matter involving such member, any partner or associate in the practice of law of such member, or in which such member has a personal interest.

§ 28. Trust Accounts; Audit.

(1) Any bank account maintained by a member to comply with the Code of Professional Responsibility of The North Carolina State Bar is, and shall be

clearly labeled and designated as, a trust account. Any safe deposit box used in connection with the practice of law in North Carolina maintained by a member of The North Carolina State Bar to comply with the Code of Professional Responsibility shall be located in this State (unless the client otherwise consents in writing) and the member shall advise any institution in which such deposit box is located that the contents of the same may include property of clients.

(2) A member of The North Carolina State Bar shall preserve, or cause to be preserved, the records of all bank accounts or other records pertaining to the funds or property of a client maintained by the member in compliance with the Code of Professional Responsibility for a period of not less than six years subsequent to the last transaction pertaining to the same or subsequent to the final conclusion of the representation of a client relative to such funds or property, whichever shall last occur. Such records shall include checkbooks, cancelled checks, check stubs, vouchers, ledgers, and journals, closing statements, accountings or other statements of disbursement rendered to clients or other parties with regard to trust funds, or similar equivalent records clearly and expressly reflecting the date, amount, source and reason for all receipts, withdrawals, deliveries and disbursements of the funds or property of a client. All of such records shall be kept as a specific prerequisite to the right to receive, deliver and disburse funds or property of a client, and shall have a public aspect relating to the protection of clients and to fitness of the member to practice law. In any instance of an alleged violation by the member of any Disciplinary Rule of the Code of Professional Responsibility or of other misconduct such records, insofar as they may relate in any way to the transaction, occurrence or client in question, shall be produced by the member for inspection, audit and copying by the Counsel upon the direction of the Chairman of the Grievance Committee or of a Hearing Committee. Such records or copies thereof shall be admissible in evidence in any disciplinary proceeding. Provided: that notice of such intended use shall be given to any client involved, if practicable, unless such client is already aware of such intended use, and, upon good cause shown by such client, the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client in the event that the proceedings otherwise become public records. Permissible means of protection shall not prejudice the accused attorney or defendant and may include, but are not limited to, excision, in camera production, retention in sealed envelopes, or similar devices. Failure to maintain such records or produce them upon such direction shall constitute grounds for disciplinary action without regard to any other matter. The cost of any audit or investigation necessitated by such failure may be taxed against the member.

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential except as provided in § 14 (12) of this article or unless and until (1) there is entered a final order for the imposition of public discipline, (2) the accused attorney or defendant requests that the matter be public, or (3) the investigation is predicated upon a conviction of the accused attorney or defendant for a crime. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or Hearing Committee enters an order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law-enforcement agencies investigating qualifications for government

employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

Editor's Note. — This Article was rewritten by amendments approved by the Supreme Court Nov. 4, 1975, and Feb. 3, 1976, and amended by amendments approved by the Supreme Court May 11, 1977, Feb. 24, 1978, and June 6, 1978.

The amendment approved by the Supreme Court May 11, 1977, added subdivision (32) of § 3, and subdivision (6) of subsection (A) of § 8, and inserted "and deliberating" near the end of subsection (5) of § 13. In § 14 the amendment inserted "of service" and "on the defendant" in the first sentence, "initially" near the beginning of the fourth sentence and added at the end of the fourth sentence the language beginning "unless one or more subsequent complaints" in the first paragraph of subsection (4) and added the second paragraph of subsection (4), rewrote subsection (10), added the language beginning "except for reasons" at the end of the third sentence of subsection (11) and inserted "consider" near the beginning of the first sentence and "accompany" in the last sentence of subsection (19). In § 23 the amendment inserted "one of" in the introductory language of subsection (A), and in § 25 the amendment

rewrote the third and fourth sentences of subdivision A(3).

The amendment approved Feb. 24, 1978 rewrote subdivision (A)(6) of § 5, added subdivision (A)(7) of § 8, rewrote subsection (10) of § 13, rewrote § 21, and rewrote subdivisions (1) and (2) of subsection (A) of § 23.

The amendment approved by the Supreme Court June 6, 1978, inserted "return of" near the beginning of the first sentence of subdivision (4) of § 14, and, also in § 14, inserted "Chairman of the" near the beginning of subdivision (9), added subdivision (9.1), deleted "beyond the control of a party" following "reasons" near the end of the second sentence of subdivision (11), added the proviso at the end of subdivision (11), inserted "Chairman of the" near the beginning of the second sentence of subdivision (17) and added to that sentence the language beginning "subject to the right," and rewrote the third sentence of subdivision (18). The amendment also inserted "one of" in the introductory language of subsection (A) of § 23 and added "and shall be considered confidential" at the end of subdivision (1) of subsection (A) of § 23.

Appendix VII. Code of Professional Responsibility of the North Carolina State Bar

PREAMBLE AND PRELIMINARY STATEMENT.

CANON 1. A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.

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DR 1-101 Maintaining Integrity and Competence of the Legal Profession.

DR 1-102 Misconduct.

DR 1-103 Disclosure of Information to Authorities.

CANON 2. A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.

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Selection of a Lawyer: Lawyer Advertising.

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DR 2-101 Publicity.

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

DR 2-103 Recommendation of Professional Employment.

DR 2-104 Suggestion of Need of Legal Services.

DR 2-105 Designation of Areas of Practice.

DR 2-106 Fees for Legal Services.

DR 2-107 Division of Fees among Lawyers.

DR 2-108 Agreements Restricting the Practice of a Lawyer.

DR 2-109 Acceptance of Employment.

DR 2-110 Withdrawal from Employment.

CANON 3. A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORIZED PRACTICE OF LAW.

Ethical Considerations.

Disciplinary Rules.

DR 3-101 Aiding Unauthorized Practice of Law.

DR 3-102 Dividing Legal Fees with a Non-Lawyer.

DR 3-103 Forming a Partnership with a Non-Lawyer.

CANON 4. A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.

Ethical Considerations.

Disciplinary Rules.

DR 4-101 Preservation of Confidences and Secrets of a Client.

CANON 5. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.

Ethical Considerations.

Interests of a Lawyer That May Affect His Judgment.

Interests of Multiple Clients.

Desires of Third Persons.

Disciplinary Rules.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

APPENDIX VII—CODE OF PROFESSIONAL RESPONSIBILITY

- DR 5-103 Avoiding Acquisition of Interest in Litigation.
- DR 5-104 Limiting Business Relations with a Client.
- DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
- DR 5-106 Settling Similar Claims of Clients.
- DR 5-107 Avoiding Influence by Others Than the Client.

CANON 6. A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY.

Ethical Considerations.

Disciplinary Rules.

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CANON 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

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Duty of the Lawyer to a Client.

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Disciplinary Rules.

- DR 7-101 Representing a Client Zealously.
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- DR 7-107 Trial Publicity.
- DR 7-108 Communication with or Investigation of Jurors.
- DR 7-109 Contact with Witnesses.
- DR 7-110 Contact with Officials.

CANON 8. A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM.

Ethical Considerations.

Disciplinary Rules.

- DR 8-101 Action as a Public Official.
- DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.

CANON 9. A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.

Ethical Considerations.

Disciplinary Rules.

- DR 9-101 Avoiding Even the Appearance of Impropriety.
- DR 9-102 Preserving Identity of Funds and Property of a Client.

Editor's Note. — The Code of Professional Responsibility was adopted by the Council of the North Carolina State Bar on Jan. 12, 1973, amended April 13, 1973, and approved by the

Supreme Court April 30, 1973. Effective Jan. 1, 1974, it replaces the Canons of Ethics in Appendix VII in the Replacement Volume.

Preamble and Preliminary Statement

Preamble

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preliminary Statement

In furtherance of the principles stated in the Preamble, the North Carolina State Bar has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system and with the legal profession. They embody the general concepts from which the Ethical Consideration and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They

constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

Editor's Note. —

For a symposium focusing upon the need for reform of the ABA Code of Professional Responsibility, see 57 N.C.L. Rev. 495 (1979).

Effect of Plea of Nolo Contendere on Subsequent Disciplinary Proceedings. — Defendant's plea of nolo contendere in the Federal District Court to a charge of receiving

and possessing chattels valued at less than \$100.00 knowing them to have been stolen or embezzled did not entitle the State Bar to summary judgment authorizing disciplinary action against the defendant. *North Carolina State Bar v. Hall*, 293 N.C. 539, 238 S.E.2d 521 (1977).

ETHICAL CONSIDERATIONS

EC1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and education standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in

violation of the Disciplinary Rules. A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

DISCIPLINARY RULES

DR1-101 Maintaining Integrity and Competence of the Legal Profession.

- (A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.
- (B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR1-102 Misconduct.

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in professional conduct that is prejudicial to the administration of justice.
- (6) Engage in any other professional conduct that adversely reflects on his fitness to practice law.

Where it appeared on the face of the notice of charges in a disciplinary proceeding that the judge may have prejudged the respondent's conduct before hearing evidence on alleged violations of subsections (1) and (5) of this rule and DR 6-101(3), his order of suspension had to be vacated, and the case retained for rehearing by the Court of Appeals. In re Robinson, 37 N.C. App. 671, 247 S.E.2d 241 (1978); In re Dale, 37 N.C. App. 680, 247 S.E.2d 246 (1978).

Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon

the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Right to Effective Assistance of Counsel. — It is axiomatic that the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

DR1-103 Disclosure of Information to Authorities.

- (A) A lawyer possessing unprivileged knowledge of a clear violation of DR1-102 should report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

- (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

Editor's Note. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-2 through EC 2-5, EC 2-7 through EC 2-11 and EC 2-14 of the Ethical Considerations and rewrote DR 2-101 through DR 2-105 of the Disciplinary Rules.

The amendment approved by the Supreme Court June 6, 1978, inserted "one or more of the practice area designations or descriptions regularly used by the reputable law list or directory;" near the beginning of the third

sentence of subdivision (5) of subsection (A) of DR 2-102 of the Disciplinary Regulations.

Only the paragraphs changed by the amendments are set out.

For note on covenants not to compete between attorneys, see 50 N.C.L. Rev. 936 (1972).

For article, "The Advent of Prepaid Legal Services in North Carolina," see 13 Wake Forest L. Rev. 271 (1977).

Applied in *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

ETHICAL CONSIDERATIONS

EC2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers, and a lawyer who participates in such activities should shun personal publicity.

EC2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

EC2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer: Generally

EC2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about (1) the availability of lawyers, (2) the practice preferences of particular lawyers, and (3) the expense of legal representation leads laypersons to avoid seeking legal advice.

EC2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, or other media, should be formulated to convey other information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, for example, one or more fields of law in which the lawyer or law firm practices or a statement that practice is limited to one or more fields of law; and (4) permitted fee information. Self-laudation is unprofessional and improper.

Selection of a Lawyer: Lawyer Advertising

EC2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service. Since lawyer advertising is calculated and not spontaneous, reasonable regulations of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

EC2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant and is disseminated in an objective and understandable fashion. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. And change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

EC2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm

name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC2-14 In some instances a lawyer confines his practice to a particular field of law. Because of the absence of controls to insure the existence of special competence, a lawyer should not hold himself out as a specialist, or as having special training or ability, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his practice or that he practices in one or more particular areas or fields of law, using designations authorized for that purpose by The North Carolina State Bar. If a lawyer discloses areas of law in which he practices or limits his practice, he should avoid any implication that he is in fact especially competent.

EC2-15 The legal profession has developed lawyer referral system designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel:

Persons Able to Pay Reasonable Fees

EC2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC2-19 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing to the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.

EC2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

EC2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.

Financial Ability to Employ Counsel:

Persons Unable to Pay Reasonable Fees

EC2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

DISCIPLINARY RULES

DR2-101 Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential customers of legal services, a lawyer may publish or broadcast, subject to DR2-103, information in print media or over radio [or] television.

Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR2-101 (A) and be presented in a dignified manner without the use of the lawyer's voice or portrait and without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or pictures. Only the following information may be published or broadcast:

- (1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
- (2) One or more fields of law in which the lawyer or law firm practices, or a statement that practice is limited to one or more fields of law, to the extent authorized under DR2-105;
- (3) Date and place of birth;
- (4) Date and place of admission to the bar of state and federal courts;
- (5) School attended, with dates of graduation and degrees awarded;
- (6) Foreign language ability;
- (7) Whether credit cards or other credit arrangements are accepted;
- (8) Office and telephone answering service hours;
- (9) Fee for an initial consultation;
- (10) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
- (11) Contingent fee rates subject to DR2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
- (12) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
- (13) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
- (14) Fixed fees for an uncontested divorce, an uncontested adoption, an uncontested personal bankruptcy, a change of name, and other, specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the categories described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

- (C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to The North Carolina State Bar. Any such application shall be served upon The North Carolina State Bar, which shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as amendments to DR 2-101(B) and other affected ethical considerations and disciplinary rules, universally applicable to all lawyers.
- (D) If the advertisement is communicated to the public over radio or television, it shall be prerecorded and approved in advance by the lawyer. A copy of all written advertisements and a written transcript of the actual transmission of all broadcast advertisements, certified to be an accurate copy or transcript by affidavit of a representative of the publisher or broadcaster, shall be retained by the lawyer for a period not less than three years.
- (E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.
- (F) If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year. Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made thereon for a period of not less than 30 days after such broadcast.
- (G) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:
- (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
 - (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
 - (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
 - (4) In and on legal documents prepared by him.
 - (5) In and on legal **textbooks**, treatises, and other legal publications, and in dignified advertisements thereof.
- (H) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

DR2-102 Professional Notices, Letterheads, Offices, and Law Lists.

- (A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, law

lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

- (1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.
 - (2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.
 - (3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.
 - (4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.
 - (5) A listing in a reputable law list, legal directory, or a directory published by a state, county or local bar association, giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. The published data may include the information allowed by DR 2-101(B) together with the following: one or more of the practice area designations or descriptions regularly used by the reputable law list or directory; scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; names and addresses of references; and, with their consent, names of clients regularly represented.
- (B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired

members of the firm or of a predecessor firm in continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

- (C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.
- (D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.
- (E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.
- (F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR2-103 Recommendation of Professional Employment.

- (A) **A lawyer shall not, except as authorized in ER 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.**
- (B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).
- (C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that,
 - (1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.
 - (2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D) (1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:
 - (a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and
 - (b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.
- (D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, and may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

- (1) A legal aid office or public defender office:
 - (a) Operated or sponsored by a duly accredited law school.
 - (b) Operated or sponsored by a bona fide nonprofit community organization.
 - (c) Operated or sponsored by a governmental agency.
 - (d) Operated, sponsored, or approved by a bar association.
- (2) A military legal assistance office.
- (3) A lawyer referral service operated, sponsored or approved by a bar association.
- (4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided that following conditions are satisfied:
 - (a) Such organization, whether or not organized for profit, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers.
 - (b) Neither the lawyer, nor his partner; nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
 - (c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
 - (d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
 - (e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, at his own expense, select counsel in addition to that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.
 - (f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.
 - (g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.
- (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR2-104 Suggestion of Need of Legal Services.

- (A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

- (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.
- (2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.
- (3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
- (4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

DR2-105 Designation of Areas of Practice.

A lawyer shall not hold himself out publicly as a specialist or as having better qualifications than others. But a lawyer may in a manner consistent with DR 2-101 and DR 2-102 hold himself out publicly as practicing in certain areas of law or as limiting his practice as follows:

- (A) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
- (B) Any lawyer may publicly disclose the field or fields of law in which the lawyer or the law firm practices, or to which the practice is limited, but only by using the practice area designations authorized by the North Carolina State Bar and published in its official publications.

DR2-106 Fees for Legal Services.

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of the law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.
- (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR2-107 Division of Fees among Lawyers.

- (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
 - (2) The division is made in proportion to the services performed and responsibility assumed by each.
 - (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.
- (B) This Disciplinary Rule does not prohibit payment pursuant to a separation or retirement agreement.

DR2-108 Agreements Restricting the Practice of a Lawyer.

- (A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.
- (B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR2-109 Acceptance of Employment.

- (A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:
- (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.
 - (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR2-110 Withdrawal from Employment.

(A) In general.

- (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
- (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
- (3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

- (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken from him, merely for the purpose of harassing or maliciously injuring any person.
- (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.
- (3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.
- (4) He is discharged by his client.

(C) Permissive withdrawal.

If DR2-110 (B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

- (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
 - (b) Personally seeks to pursue an illegal course of conduct.
 - (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.
 - (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.
 - (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.
 - (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.
- (2) His continued employment is likely to result in a violation of a Disciplinary Rule.
 - (3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
 - (4) His mental or physical condition renders it difficult for him to carry out the employment effectively.
 - (5) His client knowingly and freely assents to termination of his employment.
 - (6) He believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

CANON 3**A Lawyer Should Assist in Preventing the Unauthorized Practice of Law****ETHICAL CONSIDERATIONS**

EC3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct

of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or a law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any

jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a lawyer to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

DISCIPLINARY RULES

DR3-101 Aiding Unauthorized Practice of Law.

- (A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
- (B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR3-102 Dividing Legal Fees with a Non-Lawyer.

- (A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
 - (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
 - (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
 - (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR3-103 Forming a Partnership with a Non-Lawyer.

- (A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

Dual Representation Proper. — A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings

was not prohibited from representing plaintiff minority shareholders of the company in a derivative action against the company's directors. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

ETHICAL CONSIDERATIONS

EC4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.

It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law officer exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences

and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR4-101 Preservation of Confidences and Secrets of a Client.

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR4-101 (C), a lawyer shall not knowingly:
- (1) Reveal a confidence or secret of his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
- (C) A lawyer may reveal:
- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
 - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
 - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
 - (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
- (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR4-101 (C) through an employee.

Cited in *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

No Improper Acquisition of Interest in Subject Matter of Litigation. — A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

Representation of Multiple Clients Resulting in Conflict of Interest. — In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of the individual controllers. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977).

Informed Consent of Client as to Potential Conflict of Interest. — The consent of an individual litigant to representation by counsel with a potential conflict of interest by his representation of another party cannot be presumed to be fully informed when it is

procured without the advice of a lawyer who has no conflict of interest. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977).

Applied in *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978).

ETHICAL CONSIDERATIONS

EC5-1 The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client

wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.

EC5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

EC5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer

believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have conflicting interests.

EC5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with conflicting interests and there are few situations in which he would be justified in representing in litigation multiple clients with potentially conflicting interests. If a lawyer accepted such employment and the interests did become actually conflicting, he would have to withdraw from employment with the likelihood of resulting hardship on the clients; and for this reason, it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involved in litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgement on behalf of each client; and if the interests become conflicting, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight

possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interest and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client, and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISCIPLINARY RULES

DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.
- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
 - (1) If the testimony will relate solely to an uncontested matter.
 - (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
 - (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
 - (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Testifying on Behalf of Clients. — The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered his right to participate in the litigation. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

If it becomes obvious that an attorney ought to testify on behalf of his client it is clear that he may do so, but he or any member of his firm shall not continue representation in the trial unless he can come under the exceptions listed in

paragraphs (B)(1) through (B)(4). *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

The weight of authority in this country is that while it is a breach of professional ethics for an attorney for a party to testify as to matters other than formal matters without withdrawing from the litigation, he is not incompetent so to testify. The testimony is admissible if otherwise competent. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

While the Disciplinary Rules set forth in the Code of Professional Conduct do not control the admissibility of evidence or the competency of

witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State, and it should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

There is no inconsistency in the Code of Professional Conduct and the uniform practice that has existed in North Carolina with respect to attorneys testifying on behalf of clients. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions

whereby attorneys may testify on behalf of clients. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

The terms of this rule and DR 5-102 were not a bar to the testimony of an attorney in a prosecution for the issuance of checks with knowledge of insufficient funds to pay the checks upon presentation, where the attorney had no official responsibility in the conduct of the trial of the defendant on criminal charges, and his only connection with the case was his attempt to procure payment for his client of obligations owed to the client by the defendant, after defendant's checks were returned to the client for insufficient funds. *State v. Passmore*, 37 N.C. App. 5, 245 S.E.2d 107 (1978).

DR5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101 (B) (1) through (4).**
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.**

Testifying on Behalf of Clients. — The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered his right to participate in the litigation. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

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the question of when an attorney may be a witness for a party he represents. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions whereby attorneys may testify on behalf of clients. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

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DR5-103 Avoiding Acquisition of Interest in Litigation.

- (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
 - (1) Acquire a lien granted by law to secure his fee or expenses.
 - (2) Contract with a client for a reasonable contingent fee in a civil case.
- (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR5-104 Limiting Business Relations with a Client.

- (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.
- (B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

- (A) A lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105 (C).
- (B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105 (C).
- (C) In the situations covered by DR5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

Cited in *Chicago Title Ins. Co. v. Holt*, 36 N.C. App. 284, 244 S.E.2d 177 (1978).

DR5-106 Settling Similar Claims of Clients.

- (A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR5-107 Avoiding Influence by Others Than the Client.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not:

- (1) Accept compensation for his legal services from one other than his client.
- (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.
- (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.
- (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) A non-lawyer is a corporate director or officer thereof; or
 - (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not or does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES

DR6-101 Failing to Act Competently.

(A) A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.**
- (2) Handle a legal matter without preparation adequate in the circumstances.**
- (3) Neglect a legal matter entrusted to him.**

Where it appeared on the face of the notice of charges in a disciplinary proceeding that the judge may have prejudged the respondent's conduct before hearing evidence on alleged violations of DR 1-102(1) and (5), and subsection (3) of this rule, his order of suspension had to be vacated, and the case retained for rehearing by the Court of Appeals. In re Robinson, 37 N.C. App. 671, 247 S.E.2d 241 (1978); In re Dale, 37 N.C. App. 680, 247 S.E.2d 246 (1978).

Failure to Seek Appellate Review. — Appointed counsel who failed to seek appellate

review in each of four criminal cases held in violation of this rule. See In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979).

Failure of the respondent attorney to perfect an appeal in a criminal case in which the sentence of death had been imposed was a violation of this rule. In re Dale, 39 N.C. App. 370, 250 S.E.2d 82, appeal dismissed, 296 N.C. 584, S.E.2d (1979).

DR6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

CANON 7

A Lawyer Should Represent a Client Zealously within the Bounds of the Law

It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

A cross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and,

if knowingly done, unethical. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

Injecting Beliefs Not Supported by Evidence. — Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

ETHICAL CONSIDERATIONS

EC7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Cited in *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

Duty of the Lawyer to a Client.

EC7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of

conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional

responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceedings has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged, and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency

information available to the public without identifying his client.

EC7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice.

EC7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice, promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the

protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of

making him unavailable as a witness therein.

EC7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC7-30 Vexations or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

EC7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

EC7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal references to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DR7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
- (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR2-110, DR5-102, and DR5-105.

- (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR7-102 (B).
- (B) In his representation of a client, a lawyer may:
 - (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
 - (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR7-102 Representing a Client within the Bounds of the Law.

- (A) In his representation of a client, a lawyer shall not:
 - (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
 - (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
 - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
 - (4) Knowingly use perjured testimony of false evidence.
 - (5) Knowingly make a false statement of law or fact.
 - (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
 - (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
 - (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
- (B) A lawyer who receives information clearly establishing that:
 - (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw but without necessarily revealing his reason for wishing to withdraw.
 - (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Right to Effective Assistance of Counsel. — It is axiomatic that the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

DR7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

- (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
- (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the

defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR7-104 Communicating with One of Adverse Interest.

- (A) During the course of his representation of a client a lawyer shall not:
- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of lawyer representing such other party or is authorized by law to do so.
 - (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

DR7-105 Threatening Criminal Prosecution.

- (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR7-106 Trial Conduct.

- (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.
- (B) In presenting a matter to a tribunal, a lawyer shall disclose:
- (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
 - (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.
- (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
- (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
 - (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
 - (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
 - (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
 - (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
 - (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
 - (7) Intentionally or habitually violate any established rule of procedure or evidence.

DR7-107 Trial Publicity.

- (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by

means of public communication and that does more than state without elaboration:

- (1) Information contained in a public record.
- (2) That the investigation is in progress.
- (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
- (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
- (5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
- (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
- (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
- (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
- (5) The identity, testimony, or credibility of a prospective witness.
- (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR7-107 (B) does not preclude a lawyer during such period from announcing:

- (1) The name, age, residence, occupation, and family status of the accused.
- (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
- (3) A request for assistance in obtaining evidence.
- (4) The identity of the victim of the crime.
- (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
- (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
- (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
- (8) The nature, substance, or text of the charge.
- (9) Quotations from or references to public records of the court in the case.
- (10) The scheduling or result of any step in the judicial proceedings.
- (11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm

associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

- (F) The foregoing provisions of DR7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
- (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
 - (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
 - (5) Any other matter reasonably likely to interfere with a fair trial of the action.
- (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
 - (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness or prospective witness.
 - (3) Physical evidence or the performance or results of any examination or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
 - (5) Any other matter reasonably likely to interfere with a fair hearing.
- (I) The foregoing provisions of DR7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.
- (J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR7-107.

DR7-108 Communication with or Investigation of Jurors.

- (A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.
- (B) During the trial of a case:
 - (1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.
 - (2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.
- (C) DR7-108 (A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.
- (D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or

make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

- (E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.
- (F) All restrictions imposed by DR7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.
- (G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR7-109 Contact with Witnesses.

- (A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.
- (B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.
- (C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.

DR7-110 Contact with Officials.

- (A) A lawyer shall not give or lend anything of substantial value to a judge, official or employee of a tribunal.
- (B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:
 - (1) In the course of official proceedings in the cause.
 - (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
 - (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
 - (4) As otherwise authorized by law.

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or

absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public he should espouse only those changes which he conscientiously believes to be in the public interest.

EC8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public

officer, whether full or part time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

- (1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself, or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.**
- (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.**
- (3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.**

DR8-102 Statements Concerning Judges and Other Adjudicatory Officers.

- (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.**
- (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.**

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

Applied in *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

ETHICAL CONSIDERATIONS

EC9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstanding and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes

public confidence in the integrity and efficiency of the legal system and the legal profession.

EC9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

DISCIPLINARY RULES

DR9-101 Avoiding Even the Appearance of Impropriety.

- (A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
- (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
- (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.

DR9-102 Preserving Identity of Funds and Property of a Client.

- (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
 - (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
 - (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (B) A lawyer shall:
 - (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
 - (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Appendix VII-A. Code of Judicial Conduct

Canon

1. A Judge Should Uphold the Integrity and Independence of the Judiciary.
2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.
3. A Judge Should Perform the Duties of His Office Impartially and Diligently.
4. A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.
5. A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties.
6. A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities.
7. A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.

Editor's Note. — The North Carolina Code of Judicial Conduct was adopted by the Supreme Court of North Carolina in conference on Sept. 26, 1973, and became effective upon publication thereof in the Advance Sheets of the North Carolina Reports. The Code of Judicial Conduct was published in 283 N.C., Advance Sheet No. 6.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Code Is Guide to Meaning of § 7A-376. — to the meaning of § 7A-376. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).
The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

- A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

CANON 3

*A Judge Should Perform the Duties of His Office
Impartially and Diligently*

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should maintain order and decorum in proceedings before him.
- (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.
- (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.
- (5) A judge should dispose promptly of the business of the court.
- (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.
- (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
 - (a) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
 - (b) The broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
 - (c) The photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
 - (i) The means of recording will not distract participants or impair the dignity of the proceedings;
 - (ii) The parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
 - (iii) The reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
 - (iv) The reproduction will be exhibited only for instructional purposes in educational institutions.

B. Administrative Responsibilities.

- (1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

- (2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.
- (3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.
- (4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

- (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
- (2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
- (3) For the purposes of this section:
 - (a) The degree of relationship is calculated according to the civil law system;
 - (b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
 - (c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:
 - (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
 - (ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
 - (iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial

- interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
- (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Editor's Note. — For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

The failure of a judge to make due inquiry into the facts and law upon which his judgments were based and his execution of them upon a mere ex parte application of counsel for defendants violates this Canon. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Failure to Accord Prosecutor Opportunity to Be Heard. — A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant or his counsel are entitled to be present and to be heard. Failure to accord the prosecutor such opportunity violates

this Canon. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Failure to Disqualify Himself on Motion to Recuse. — The trial judge committed error by not disqualifying himself from considering a motion to recuse himself from hearing the plaintiffs' motion to set aside a judgment on grounds of excusable neglect, since a reasonable man knowing all the circumstances would have had doubts about the judge's ability to rule on the motion to recuse in an impartial manner. McClendon v. Clinard, 38 N.C. App. 353, 247 S.E.2d 783 (1978).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

- A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
- B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official.
- C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

- A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.
- B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.
 - (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization.
 - (3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.
- C. Financial Activities.
- (1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.
 - (2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.
 - (3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.
 - (4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:
 - (a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
 - (b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

- (c) A judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds \$100, the judge reports it in the same manner as he reports compensation in Canon 6C.
- (5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.
- (6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.
- (7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.
- D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:
- (1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.
- (2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.
- E. Arbitration. A judge should not act as an arbitrator or mediator.
- F. Practice of Law. A judge should not practice law.
- G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

- A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.
- B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

- C. Public Reports. A judge shall report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. No report is required if no such compensation or reimbursement of expenses is received. The word "activity" as used in Canon 6 does not include the receipt of rents, dividends or interest or profits realized from capital gains. Any required report should be made annually and filed as a public document as follows: The members of the Supreme Court should file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals should file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, should file such report with the Clerk of the Superior Court of the county in which he resides. For each calendar year, such report should be filed during the month of January of the following year.

Editor's Note. — The amendment adopted Dec. 30, 1974, substituted "shall" for "should" in the first sentence of subdivision C and rewrote all of subdivision C following the first sentence.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

- (1) A judge or candidate for election to judicial office should not:
 - (a) Act as a leader or hold any office in a political organization. For example, he may not attend a political convention on any level as a delegate; nor may he preside or serve as an officer at any precinct meeting, convention, or other political convocation. He may attend a precinct meeting, convention or other political convocation provided he does not violate any other Canon, particularly 7A(1)(b) or (c).
 - (b) Make speeches for a political organization or candidate or publicly endorse a candidate for public office; provided, a judge or candidate for judicial office may endorse, as between contestants for a judicial office, the candidate he considers best qualified and may contribute to a campaign fund in behalf of such candidate, but may not solicit funds in behalf of such candidate.
 - (c) Solicit funds for a political organization or candidate.
 - (d) Make financial contributions to any candidate for political office, except as expressly provided in subsection (b) hereinabove, unless the candidate is a member of the judge's or judicial candidate's family.
- (2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, identify himself as a member of a political party, and contribute to a political party or organization.
- (3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.
- (4) The foregoing provisions of Canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance

with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge himself.

B. Campaign Conduct.

- (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:
 - (a) Should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;
 - (b) Should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;
 - (c) Should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.
- (2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.
- (3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Editor's Note. — The amendment adopted Dec. 30, 1974, added the proviso to subdivision (1)(b) of subsection A.

The amendment adopted March 16, 1976, added the last two sentences in subdivision (1)(a) of subsection A, substituted "or candidate for

judicial office" for "who is not at that time a candidate for election to judicial office" in the proviso to subdivision (1)(b) of subsection A, added subdivisions (1)(d) and (4) to subsection A and deleted "only insofar as permitted by law" in subdivision (2) of subsection A.

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

- (a) Continue to act as an officer, director, or non-legal advisor of a family business;
- (b) Continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

Appendix VIII. Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

Article

IV. Appointment of Counsel.

VI. Procedure for Payment of Compensation.

ARTICLE IV.

Appointment of Counsel.

Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, an indigent defendant charged with a capital offense shall be entitled to be represented by one counsel provided in appropriate cases in the discretion of the Court one additional assistant counsel at either the trial or appellate level, or both, may be appointed.

Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section.

Editor's Note. — The amendment adopted by the Council of The North Carolina State Bar at its meeting on October 27, 1977, further

considered on January 13, 1977, and April 14, 1978, and approved by the Supreme Court May 26, 1978, added sections 4.8 to 4.10.

APPENDIX VIII—APPOINTMENT OF COUNSEL

ARTICLE VI.

Procedure for Payment of Compensation.

Section 6.6. Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court.

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar at its regular quarterly meeting in July, 1973, and approved by the Supreme Court Aug. 31, 1973, added § 6.6.

As the rest of this article was not changed by the amendment, only § 6.6 is set out.

Appendix IX. Rules Governing Admission to Practice of Law

(Effective February 1, 1976.)

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 21

OCCUPATIONAL LICENSING BOARDS

CHAPTER 30

BOARD OF LAW EXAMINERS

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APPENDIX IX—RULES GOVERNING ADMISSION TO PRACTICE OF LAW

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SECTION .0100. ORGANIZATION

.0101 Address

The offices of the Board of Law Examiners of the State of North Carolina are located in the Law Building at 107 Fayetteville Street, Raleigh, N. C. The mailing address is P. O. Box 25427, Raleigh, N. C. 27611. The offices are open from 9:00 a.m. to 5:00 p.m., Monday through Friday.

History Note: Statutory Authority G.S. 84-24; 150A-60; Eff. February 1, 1976.

.0102 Purpose

The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0103 Membership

The Board of Law Examiners of the State of North Carolina consists of eleven members of the North Carolina Bar elected by the Council of the North Carolina State Bar. One member of said board is elected by the board to serve as chairman for such period as the board may determine. The board also employs an executive secretary to enable the board to perform its duties promptly and properly. The executive secretary, in addition to performing the administrative functions of the position, may act as attorney for the board.

Editor's Note. — The amendment adopted by the Board of Law Examiners on June 23, 1977, and filed July 1, 1977, substituted "eleven members" for "nine members" in the first sentence.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0200. GENERAL PROVISIONS

.0201 Compliance Necessary

No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the state.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0202 Definitions

(a) The term "board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the board.

(b) The term "Secretary" as used in this chapter refers to the "Executive Secretary of the Board of Law Examiners of the State of North Carolina."

(c) Every word importing the masculine gender only shall extend and be applied to females as well as to males.

(d) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners.

(e) As used in these rules, the word "chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

Editor's Note. — The amendment adopted by the Board of Law Examiners on June 23, 1977, and certified July 1, 1977, added the second sentence of subsection (a) and added subsections (d) and (e).

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0203 Applicants

For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0204 List

As soon as possible after the filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0205 Hearings

Every applicant may be required to appear before the board to be examined about any matters pertaining to his or her moral character, educational background or any other matters set out in Section .0500 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0206 Nonpayment Fees

Failure to pay the fees as required by these rules shall result in a denial of

the registration or application to take the North Carolina Bar Examination. All checks payable to the board for any fees which are not honored upon presentment shall be returned to the registrant or applicant who shall, within ten (10) days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order, any fees payable to the board.

Editor's Note. — This rule was adopted by the Board of Law Examiners on June 23, 1977, and certified July 1, 1977.

SECTION .0300. REGISTRATION

.0301 Who Must Register

Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the secretary at the offices of the board a properly completed registration form prescribed and supplied by the board. The registration form may be obtained by writing or calling the offices of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0302 Registration Forms

Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the board. The registration form requires a person to supply information relating to his background, including family, education, employment, whether he has been a party to any disciplinary or legal proceedings, character references and a certification to be completed by the applicant's dean.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0303 Filing Date

Registrations shall be filed with the secretary at the offices of the board at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0304 Fees; Late Registration

Each registration by a resident of the State of North Carolina must be accompanied by a fee of \$25.00 and each registration by a non-resident shall be accompanied by a fee of \$40.00. An additional fee of \$50.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the board. No part of a registration fee shall be refunded for any reason whatsoever.

History Note: Statutory Authority G.S. 84-24, 25; Eff. February 1, 1976.

SECTION .0400. APPLICATIONS OF GENERAL APPLICANTS

.0401 How to Apply

After complying with the registration provisions of Section .0300 of this Chapter, applications for admission to an examination must be made upon forms supplied by the board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or calling the board's offices.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0402 Application Form

The application form requires an applicant to supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar. In addition, all applicants must submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a birth certificate. The application must be filed in duplicate. The duplicate may be a photocopy of the original.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0403 Filing Deadline

Applications must be filed with and received by the secretary at the offices of the board not later than 12:00 noon, Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination; provided, however, upon petition to the board and for good cause shown and upon payment of a late filing fee of \$100 (in addition to all other fees required by these rules), an applicant may be permitted to file a late application with the board no later than the third Tuesday in February of the year in which the applicant applies to take the written bar examination.

Editor's Note. — The amendment adopted June 23, 1977, certified July 1, 1977, added the proviso.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0404 Fees

Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of \$130.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of \$130.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident. All said fees shall be payable to the board.

History Note: Statutory Authority G.S. 84-24;
25; Eff. February 1, 1976.

.0405 Refund of Fees

No part of the fee required by Rule .0404 of this chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half (½) of the fee may be refunded to the applicant in the discretion of the board; provided, however, no part of any fee paid to the National Conference of Bar Examiners or its successor shall be refunded.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0406 Bad Check Policy (Deleted)

Editor's Note. — This rule was deleted by amendment adopted June 23, 1977, certified July 1, 1977.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .0500. REQUIREMENTS FOR APPLICANTS

.0501 Requirements for General Applicants

Before being licensed by the board to practice law in the state of North Carolina, a general applicant shall:

- (1) be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;
- (2) have registered as a general applicant in accordance with the provisions of Section .0300 of this Chapter;
- (3) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;
- (4) (repealed)
- (5) be of the age of at least eighteen (18) years;
- (6) be and continuously have been a bona fide citizen and resident of the state of North Carolina on and from the 15th day of June of the year in which the applicant applies to take the written bar examination;
- (7) have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;
- (8) stand and pass a written bar examination as prescribed in Section .0900 of this Chapter.

Editor's Note. — The amendment adopted June 23, 1977, certified July 1, 1977, repealed subdivision (4).

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0502 Requirements for Comity Applicants

Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application may be licensed by the board to practice law in the state of North Carolina, without written examination, in the discretion of the board, provided each such applicant shall:

- (1) (repealed)
- (2) file written application with the secretary, upon such form supplied by the board, not less than six (6) months before the application shall be considered by the board; the application requires:
 - (a) that an applicant supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, a statement of the applicant's practice of law, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar;
 - (b) that all applicants submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a certification of the court of last resort from the jurisdiction the applicant is applying;
 - (c) that it must be filed in duplicate and the duplicate may be a photocopy of the original.
- (3) pay to the board with each written application a fee of \$400.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident, no part of which may be refunded to the applicant whose application is denied;
- (4) be and continuously have been a bona fide citizen and resident of the state of North Carolina for a period of at least sixty (60) days immediately prior to the consideration of his application to practice law in the state of North Carolina;
- (5) prove to the satisfaction of the board:
 - (a) that the applicant is licensed to practice law in a state, the District of Columbia or a territory of the United States having comity with North Carolina; and
 - (b) that in such state, the District of Columbia or a territory of the United States having comity with North Carolina the applicant has been, for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, actively and substantially engaged in:
 - (i) the practice of law as defined by G.S. 84-2.1, or
 - (ii) activities which would constitute the practice of law if done for the general public, or
 - (c) that in such state, the District of Columbia, or a territory of the United States having comity with North Carolina the applicant has been, for at least three (3) years out of the last five (5) years

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immediately preceding the filing of his application with the secretary, serving as,

- (i) a judge of a court of record, or
- (ii) a full-time teacher in a law school approved by the Council of the North Carolina State Bar, or
- (d) that the applicant has been, for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, serving as
 - (i) a full-time teacher in a North Carolina law school approved by the Council of the North Carolina State Bar, or
 - (ii) a full-time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill, or
- (e) that the applicant has been for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, serving in the Armed Forces of the United States of America and has been actively and substantially engaged in:
 - (i) the practice of law as defined by G.S. 84-2.1, or
 - (ii) activities which would constitute the practice of law if done for the general public.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to in subsection (b) above. Time spent in North Carolina in activities which would constitute the practice of law if done for the general public, not to exceed three (3) years, may be included in computing the five (5) year period referred to in subsections (b), (c) and (d) above.

- (6) satisfy the board that the state in which the applicant is licensed and from which he seeks comity will admit attorneys licensed to practice in the state of North Carolina to the practice of law in such state without written examination;
- (7) be in good professional standing in the state, the District of Columbia or territory of the United States from which he seeks comity;
- (8) furnish to the board such evidence as may be required to satisfy the board of his good moral character;
- (9) applicants must meet the educational requirements of section .0900 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971.
- (10) not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing of the applicant's comity application.

Editor's Note. — The amendment adopted at a regular quarterly meeting of the North Carolina State Bar and approved by the Supreme Court Jan. 31, 1977, inserted "the District of Columbia or a territory of the United States" and added "and" in paragraph (a) of subdivision (5), rewrote the introductory language in paragraph (b) of subdivision (5), deleted former clauses (iii) and (iv), and the former last sentence of paragraph (b) of subdivision (5) and added paragraph (c) of subdivision (5). Clauses (i) and (ii), and former clause (iii) and the next-to-last sentence of new paragraph (c) incorporated the substance of the provisions deleted in paragraph (b). The amendment also inserted "the District of

Columbia or territory of the United States" in subdivision (7) and added subdivision (10).

The amendment adopted June 23, 1977, certified July 1, 1977, repealed subdivision (1), which read "be a citizen of the United States," and, in subdivision (5), deleted former clause (iii) of paragraph (c) as added by the amendment certified Jan. 27, 1977, added present paragraph (d), of which clause (ii) duplicates the clause deleted in paragraph (c), and inserted the reference to paragraph (d) near the end of subdivision (5).

The amendment adopted at a regular quarterly meeting of the Council of the North Carolina State Bar and approved by the Supreme Court Feb. 24, 1978, added subdivision (4)(e).

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0600. MORAL CHARACTER

.0601 Burden of Proof

Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. If there are material factual disputes, the board must resolve them by making findings of fact. If the disputes arise out of charges initially made before the board, the board must determine whether the charges have been proved by a preponderance of the evidence before it can rely on them in concluding that an applicant has not shown his good moral character. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

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Scope of Judicial Review. — The “whole record” test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

.0602 Information

All information furnished to the board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the board.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0603 Failure to Disclose

No one shall be licensed to practice law in this state by examination or comity:

- (1) who fails to disclose fully to the board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or
- (2) who fails to disclose fully to the board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0604 Bar Candidate Committee

Every applicant shall appear before a bar candidate committee, appointed by the chairman of the board, in the judicial district in which he resides, or in such other judicial district as the board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the committee as may be required on such forms as may be provided by the board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised of the time and place of his appearance before the bar candidate committee.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0605 Denial; Re-application

No new application or petition for reconsideration of a previous application from an applicant who has been denied permission to take the bar examination by the board on the grounds of failure to prove good moral character shall be

considered by the board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the board.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .0700. EDUCATIONAL REQUIREMENTS

.0701 General Education

Each applicant to take the examination must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

Editor's Note. — The amendment adopted June 23, 1977, and certified July 1, 1977, rewrote this rule.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0702 Legal Education

Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law shall file with the secretary a certificate from the president, dean or other proper official of the law school approved by the Council of the North Carolina State Bar, a list of which is available in the office of the secretary, or shall otherwise show to the satisfaction of the board that the applicant has or will receive a law degree within sixty (60) days after the date of the written examination or for all general applicants who apply for admission to practice law in the State of North Carolina in or before the month of January, 1978, but not thereafter, that the applicant has successfully completed the courses required by the Council of the North Carolina State Bar, or will complete such courses within sixty (60) days after the date of the written examination provided in Section .0900 of this chapter being the same courses as those set out in Rule .0903 of this chapter.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .0800. PROTEST

.0801 Nature of Protest

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0802 Format

A protest shall be made in writing, signed by the person making the protest

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and bearing his home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0803 Notification; Right to Withdraw

The secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0804 Hearing

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the board at a time and place to be designated by the board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no license to practice law shall be issued to him as provided by Rule .1302 of this chapter until final disposition of the protest in favor of the applicant.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0805 Withholding License

Nothing herein contained shall prevent the board on its own motion from withholding its license to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Section .0600 of this Chapter.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .0900. EXAMINATIONS

.0901 Written Examination

One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0902 Dates

The examination shall be held in the City of Raleigh between July 1 and August 31 on such dates as the board may set from year to year.

History Note: Statutory Authority G.S. 84-24;
February 1, 1976.

.0903 Subject Matter

The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.0904 Passing Score

The board shall determine what shall constitute the passing of an examination.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .1000. REVIEW OF WRITTEN BAR EXAMINATION

.1001 Review

An unsuccessful applicant to the bar examination may examine the test booklets containing his essay examination along with the model answers and the essay examination in the board's offices.

History Note: Statutory Authority G.S. 93B-8;
Eff. February 1, 1976.

.1002. Fees

The board will furnish an unsuccessful applicant a copy of his essay examination at a cost to be determined by the secretary not to exceed \$20.00. No copies of the board's model answers will be made or furnished to any applicant.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.1003 Multistate Bar Examination

There is no provision for review of the Multistate Bar Examination.

History Note: Statutory Authority G.S. 93B-8;
Eff. February 1, 1976.

.1004 Scores

The Board will not release to applicants the scores on bar examinations. Only upon written request of an applicant will the board furnish the Multistate Bar Examination score of said applicant to another board of bar examiners or like organization that administers the admission of attorneys into that jurisdiction.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1005 Board Representative

The secretary of the board serves as the representative of the board during this review of the written bar examination by an unsuccessful applicant. The secretary is not authorized to discuss any specific questions and answers on the bar examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

SECTION .1100. RULEMAKING PROCEDURES

(Repealed)

Editor's Note. — This section was repealed by amendment adopted June 23, 1977, certified July 1, 1977.

SECTION .1200. BOARD HEARINGS

.1201 Nature of Hearings

(a) All general applicants may be required to appear before the board at a hearing to answer inquiry about any matter under these rules.

(b) Each comity applicant shall appear before the board to satisfy the board that he or she has met all the requirements of Rule .0502.

Editor's Note. — This Section .1200, formerly entitled "Contested Cases," was rewritten by amendment adopted by the Board of Law Examiners June 23, 1977, and certified July 1, 1977. The amendment substituted present Rules .1201 through .1207 for former Rules .1201 through .1209. The history notes from the former rules in this section have been added to the corresponding rules in the section as amended.

History Note: Statutory Authority G.S. 150A-11; 23; Eff. February 1, 1976.

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a

man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. If there are material factual

disputes, the board must resolve them by making findings of fact. If the disputes arise out of charges initially made before the board, the board must determine whether the charges have been proved by a preponderance of the evidence before it can rely on them in concluding that an applicant has not shown his good moral character. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of

misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Scope of Judicial Review. — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

.1202 Notice of Hearing

(a) The chairman will schedule the hearings before the board and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or his attorney within a reasonable time before the date of the hearing.

History Note: Statutory Authority G.S. 150A-23; Eff. February 1, 1976.

.1203 Who Shall Conduct Hearings

All hearings shall be heard by the board except that the chairman may designate three or more members to serve as a panel to conduct these hearings. A panel will report to the board its findings and if called for, a favorable recommendation. If no recommendation is made by the panel, the chairman will schedule a de novo hearing before the full board.

Editor's Note. — Former Rule .1203, amendment adopted at a regular quarterly Examination Review Hearing, was repealed by meeting of the Council of the North Carolina

APPENDIX IX—RULES GOVERNING ADMISSION TO PRACTICE OF LAW

State Bar and approved by the Supreme Court
November 4, 1970.

History Note: Statutory Authority G.S.
150A-11; Eff. February 1, 1976.

.1204 Continuances; Motions for

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the board and will be granted or denied by the chairman of the board.

History Note: Statutory Authority G.S.
150A-24; Eff. February 1, 1976.

.1205 Subpoenas

(a) The board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The secretary of the board is delegated the power to issue subpoenas in the board's name.

History Note: Statutory Authority G.S.
150A-23; Eff. February 1, 1976.

.1206 Depositions and Discovery

(a) A deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N.C. Rules of Civil Procedure.

(b) A party may submit sworn affidavits as evidence to be considered by the board in a board hearing. The board will take under consideration sworn affidavits presented to the board by persons desiring to protest an applicant's admission to the North Carolina Bar.

History Note: Statutory Authority G.S.
150A-11; Eff. February 1, 1976.

.1207 Reopening of a Case

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner or his attorney and made a part of the record of the hearing.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .1300. LICENSES

.1301 Interim Permit for Comity Applicants

No license shall be issued to any comity applicant for admission under Rule .0502 of this Chapter except at the time of the annual licensing of the general applicants; provided, the board may at any other time, in its discretion, grant an interim permission to such comity applicants to practice law until license shall be issued.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.1302 Licenses for General Applicants

Upon compliance with the rules of the board, and all orders of the board, the secretary, upon order of the board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the board in the form and manner as may be prescribed by the board, and at such times as prescribed by the board.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

SECTION .1400. JUDICIAL REVIEW

.1401 Appeals

Any person may appeal from an adverse ruling by the Board of Law Examiners. A general applicant may appeal from an adverse ruling or determination by the board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Law Examiners denying his application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.1402 Notice

Notice of appeal shall be given, in writing, within twenty (20) days after notice of such ruling or determination and written exceptions to the ruling or determination filed with the secretary, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the board becoming final.

APPENDIX IX—RULES GOVERNING ADMISSION TO PRACTICE OF LAW

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.1403 Record to Be Filed

Within sixty days after receipt of the notice of appeal, the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County, at the expense of the appellant, the record of the case, comprising:

- (1) the application and supporting documents or papers filed by the applicant with the board;
- (2) a complete transcript of the testimony when taken at the hearing;
- (3) copies of all pertinent documents and other written evidence introduced at the hearing;
- (4) a copy of the decision of the board; and
- (5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

.1404 Wake County Superior Court

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

Cited in In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

.1405 North Carolina Supreme Court

Any party to the review proceeding, including the board, may appeal to the Supreme Court from the decision of the superior court. No appeal bond shall be required of the board.

History Note: Statutory Authority G.S. 84-24;
Eff. February 1, 1976.

Appendix IX-A. Rules Governing Practical Training of Law Students

(Approved by the Supreme Court March 14, 1973.)

Article	Article
I. Purpose.	V. Supervision.
II. General Definition.	VI. Activities.
III. Eligibility.	VII. Use of Student's Name.
IV. Form and Duration of Certification.	VIII. Miscellaneous.

Editor's Note. — These rules were adopted by the Council of the North Carolina State Bar at its regular quarterly meeting in October, 1972, and approved by the Supreme Court March 14, 1973.

ARTICLE I — Purpose:

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

ARTICLE II — General Definition:

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

A. *Legal Aid Clinic* — An established or proposed department, division, program or course in a law school under the supervision of at least one full time member of the school's faculty or staff who has been admitted and licensed to practice law in this State and conducted regularly and systematically to render legal services to indigent persons.

B. *Indigent Persons* — A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a Judge of the General Court of Justice.

C. *Legal Aid* — Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

D. *Third Year Law Student* — A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

E. *Lawyer* — Supervising lawyer means sole practitioner, one or more lawyers sharing offices but not partners, one or more lawyers practicing together in a partnership or in a professional corporation.

F. *Second Year Law Student* — A student regularly enrolled and in good standing in a law school in this state who has satisfactorily and substantially completed fifty percent (50%) of the requirements for a first professional degree in law (J.D. or its equivalent).

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar on April 15, 1977, and approved by the Supreme Court May 11, 1977, added subdivision F. The

order amending this Article further provides "that these amendments be on a trial basis for one year commencing July 1, 1977."

ARTICLE III — Eligibility:

In order to engage in activities permitted by these rules, the law student must:

A. Be duly enrolled in this State in a law school approved by the Council of The North Carolina State Bar.

B. A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two thirds of the requirements for a first professional degree in law (J.D. or its equivalent); provided a Second Year Law Student as defined in Article II may engage in the activities specified in Article VI, Section C subject to the limitations set forth in said Article VI, except that the supervising attorney must be present at all trials.

C. Be certified by the Dean of his law school, on forms provided by The North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the Dean without a hearing or any showing of cause and for any reason.

D. Be introduced to the Court in which he is appearing by an attorney admitted to practice in that Court.

E. Neither ask for nor receive any compensation or remuneration of any kind from any client for whom he renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

F. Certify in writing that he has read and is familiar with the Canons of Professional Ethics of North Carolina and the opinions interpretive thereof.

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar on April 15, 1977, and approved by the Supreme Court May 11, 1977, added the proviso to subdivision B. The order adopting the

amendment further provides "that these amendments be on a trial basis for one year commencing July 1, 1977."

ARTICLE IV — Form and Duration of Certification:

A certification of a student by the Law School Dean:

A. Shall be filed with the Secretary of The North Carolina State Bar in the Office of The North Carolina State Bar in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first Bar Examination following the student's graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he is admitted to the Bar.

B. May be withdrawn by the Dean at any time without a hearing and without any showing of cause and *shall* be withdrawn by him if the student ceases to be duly enrolled as a student prior to his graduation, by mailing a notice to that effect to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh, to the supervising attorney and to the student.

C. May be withdrawn by any Resident Superior Court Judge or Judge holding the Court of the judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's Dean, and to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh.

D. Forms to be used for certification and withdrawal of certification are attached.

ARTICLE V — Supervision:

A supervising lawyer shall:

A. Be an active member of the State Bar of North Carolina, and before supervising the activities specified in Rule VI hereof, shall have actively practiced law in North Carolina as a full time occupation for at least two years.

B. Supervise no more than five students concurrently.

C. Assume personal professional responsibility for any work undertaken by the student while under his supervision.

D. Assist and counsel with the student in the activities mentioned in these rules, and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client.

E. Read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing thereof, and read and approve any documents which shall be prepared by such student for execution by any person or persons not a member or members of the State Bar of North Carolina prior to the submission thereof for execution.

F. As to any of the activities specified by Rule VI hereof:

1. Before commencing supervision of any student, file with the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh, a notice in writing, signed by him, stating the name of such student, the period or periods during which he expects to supervise the activities of such student, and that he will adequately supervise such student in accordance with these rules.

2. Notify the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh in writing promptly whenever his supervision of such student shall cease.

ARTICLE VI — Activities:

A properly certified student may engage in the activities provided in this section under the supervision of an attorney qualified and acting in accordance with the provision of Section V:

A. Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that he is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

B. Without being physically accompanied by the supervising attorney, a student may represent indigent persons in the following hearings or proceedings:

1. Administrative hearings and proceedings before Federal, State, and local administrative bodies.

2. Civil litigation before Courts or Magistrates, provided the case is one which could be assigned to a magistrate under North Carolina General Statute Section 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate.

3. In any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of Court.

C. Without being physically accompanied by the supervising attorney, a student may represent the State in the prosecution of all misdemeanors with the consent of the District Solicitor.

D. When physically accompanied by the supervising attorney who has read, approved, and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the Court, a student may represent indigent clients in the following hearings or proceedings, provided however, the approval of the presiding Judge is first secured:

1. All juvenile proceedings.
2. The presentation of a brief and oral argument in any civil or criminal matter in the District or Superior Court.
3. All misdemeanor cases.

E. A student may accompany his supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding Judge.

F. In all cases under this Rule in which a student makes an appearance in Court or before an administrative agency on behalf of a client, he shall have the written consent in advance of the client and his supervising attorney. The client shall be given a clear explanation, prior to the giving of his consent, that the student is not an attorney. These consents shall be filed with the Court and made a part of the record in the case.

G. In all cases under this rule in which a student is permitted to make an appearance in Court or before an administrative agency on behalf of a client, he may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the Jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

H. Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless he is under the direct and physical supervision of the supervising attorney.

ARTICLE VII — Use of Student's Name:

A. A student's name may properly:

1. Be printed or typed on briefs, pleadings, and other similar documents on which the student has worked with or under the direction of the supervising lawyer, provided the student is clearly identified as a student certified under these rules, and provided further that a student shall not sign his name to such briefs, pleadings, or other similar documents.
2. Be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his signature a clear identification that he is certified under these rules, such as "Certified Law Student under the Supervision of
....." (Supervising lawyer).

B. A student's name may not appear:

1. On the letterhead of a Supervising lawyer; or
2. On a business card bearing the name of a Supervising lawyer; or
3. On a business card identifying the student as certified under these rules.

ARTICLE VIII — Miscellaneous:

A. Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of these rules.

B. These rules are subject to amendment, modification, revision, supplement, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

NORTH CAROLINA RULES
GOVERNING PRACTICAL TRAINING
OF LAW STUDENTS

IN RE:
APPLICATION OF

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO
PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS
PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE
BAR
TO: THE NORTH CAROLINA STATE BAR:

- The undersigned certifies as follows:
1. Name and address of person signing this certificate.
.....
 2. Name and address of law school and official connection with same.
 3. is duly enrolled in the State of
North Carolina in a law school approved by the Council of The North Carolina
State Bar and is in good standing in said law school and has satisfactorily
completed at least two-thirds of the requirements for a first professional
degree in law (J.D. or its equivalent).
 4. is of good character with the requisite
legal ability and training to perform as a legal intern pursuant to the Rules
and Regulations Governing Practical Training of Law Students.
- Seal (of School), Dean
.....

..... Name of School
....., Dean of Law School being first duly
sworn on oath deposes and says that he has read the foregoing certificate and
he knows the contents thereof; that the statements contained therein are true
of his own knowledge, except as to those matters stated upon information and
belief, and, as to those, he believes them to be true.
Sworn and subscribed to before me
this day of, 19....
..... Notary Public
My commission expires
Form: Dean's Certificate

NORTH CAROLINA RULES
GOVERNING PRACTICAL TRAINING
OF LAW STUDENTS

IN RE:
APPLICATION OF

WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL
TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF
THE NORTH CAROLINA STATE BAR.
TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of The North
Carolina State Bar as to the eligibility for the above named individual to

APPENDIX IX-A—TRAINING OF LAW STUDENTS

participate in the Practical Training of Law Students Program promulgated by The North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify The North Carolina State Bar that is no longer eligible to participate in said program.

Seal (of School)

....., Dean

Name of School

....., Dean of Law School being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me

this the day of, 19....

....., Notary Public.

My commission expires

Form: Withdrawal of Dean's Certificate

Appendix X. North Carolina Supreme Court Library Rules

General Provisions

Appendix I

Rule

Official Register, State of
North Carolina

2. Definitions.

Hours and Use of Library

5. Use after Hours.

General Provisions

2. Definitions. — Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(f) "Official Register" means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

Editor's Note. — The amendment promulgated Nov. 28, 1972, rewrote subsection (f). As the rest of this rule was not changed by the amendment, only the introductory paragraph and subsection (f) are set out.

Hours and Use of Library

5. Use after Hours. — Only the following persons may enter the Library or use the material or facilities of the Library when the Library is not open for public use as provided for by Rule 3:

(a) Members and employees of the Supreme Court and the Court of Appeals.

(b) Members of the North Carolina State Bar, Inc., who have offices in the Justice Building.

(c) Any person who has a valid Library use permit issued under the hand and seal of the Librarian. The Librarian in his discretion may issue Library use permits upon written application in the form prescribed by the Librarian. Each respective Library use permit shall be valid for the period determined by the Librarian in his discretion, but in no event shall a permit be valid for more than two years from the date of its issuance. The Librarian in his discretion may revoke any Library use permit at any time. Library use permits may be used only between the hours of five o'clock in the afternoon and twelve o'clock midnight, Mondays through Fridays.

Editor's Note. — The amendment effective April 14, 1975, added the last sentence of subsection (c).

APPENDIX X—NORTH CAROLINA SUPREME COURT LIBRARY RULES

Appendix I.

OFFICIAL REGISTER
STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Principal Clerks, Reading Clerks, Sergeants-at-Arms, Legislative Services Officer, and Director of Research of the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration; Secretary of Transportation and Highway Safety; Secretary of the Department of Natural and Economic Resources; Secretary of Human Resources; Secretary of Social Rehabilitation and Control; Secretary of Commerce; Commissioner of Revenue; Secretary of Art, Culture and History; and Secretary of Military and Veterans' Affairs.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The Solicitors and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Office of Archives and History.

(8) The Director, Assistant Director, and Assistant Counsel of the Administrative Office of the Courts.

(9) The Secretary-Treasurer of The North Carolina State Bar.

Editor's Note. — This Appendix I was promulgated Nov. 28, 1972.

Appendix XI. Comparative Tables

(4) TABLE OF LAWS CODIFIED SUBSEQUENT TO 1919

PUBLIC-LOCAL LAWS OF 1923

Ch.	Sec.	General Statutes
583	1-12	160A-349.1 to 160A-349.12

SESSION LAWS OF 1949

Ch.	Sec.	General Statutes
1077	1-6	143-273 to 143-278 note

SESSION LAWS OF 1951

Ch.	Sec.	General Statutes
87		160A-349.13

SESSION LAWS OF 1953

Ch.	Sec.	General Statutes
899		118-1 L.M.

SESSION LAWS OF 1955

Ch.	Sec.	General Statutes
904	1-5	143-329 to 143-333

SESSION LAWS OF 1957

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Raleigh, North Carolina

October 15, 1979

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1979 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN,
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